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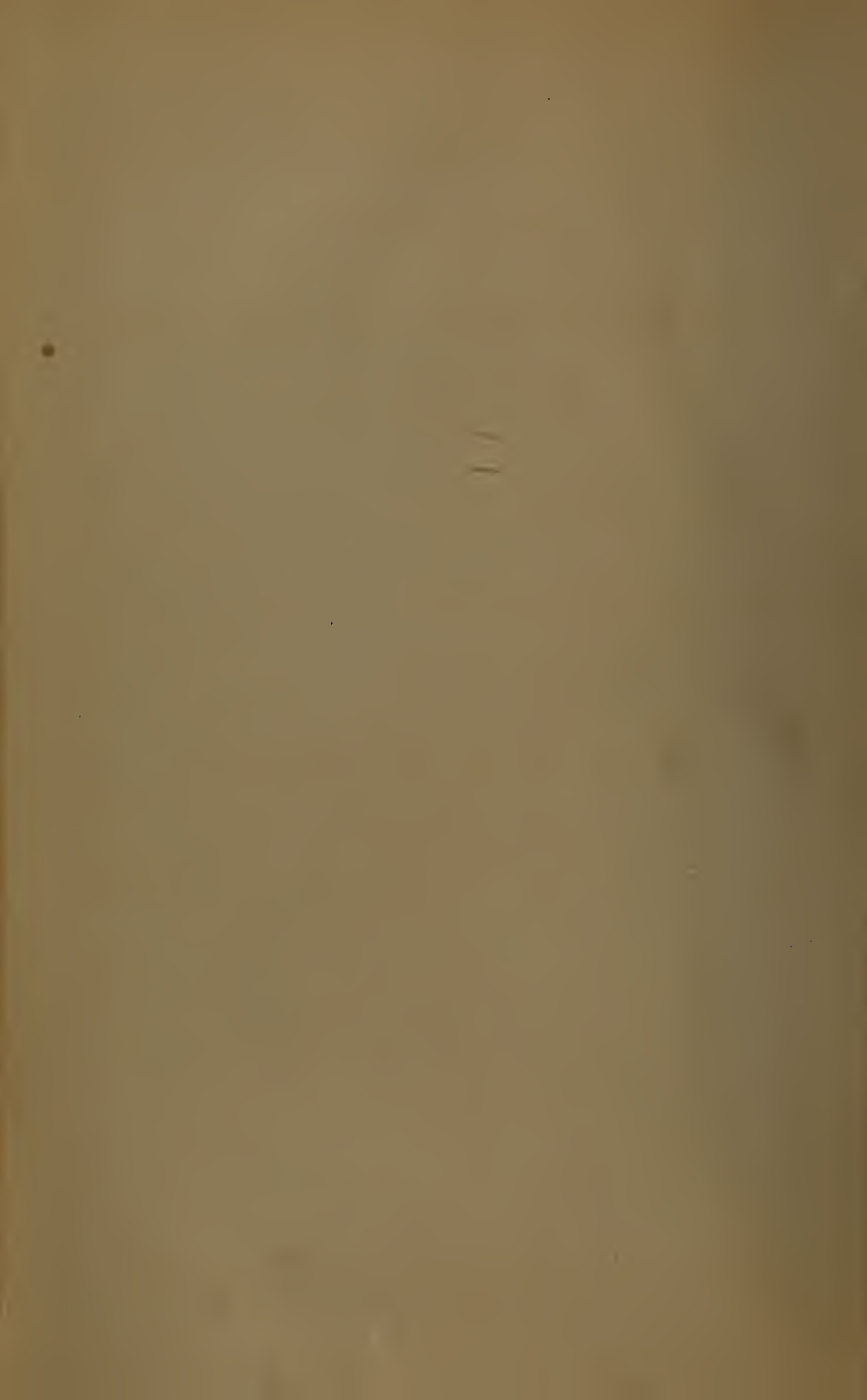

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No. 2144

United States Circuit Court of Appeals

For the Ninth Circuit.

ROBERT S. HALE,

Appellant,

vs.

AMES REALTY COMPANY, a Corporation, et al.,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Montana.

FILED
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No. 2144

United States
Circuit Court of Appeals
For the Ninth Circuit.

ROBERT S. HALE,

Record of appeal

Upon Appeal from the United States District Court for the District of Montana.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Solicitors of Record.

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Solicitor for Defendant and Appellant R. S. Hale.

O. W. McCONNELL, Esq., of Helena, Montana,
Solicitor for Complainant and Appellee.

Messrs. SHOBER & RASCH, of Helena, Montana.

CARL RASCH, Esq., of Helena, Montana.

M. S. GUNN, Esq., of Helena, Montana.

IRA T. WIGHT, Esq., of Helena, Montana.

H. S. HEPNER, Esq., of Helena, Montana.

Messrs. H. G. & S. H. McINTIRE, of Helena, Montana.

C. A. SPAULDING, Esq., of Helena, Montana.

Messrs. GALEN & METTLER, of Helena, Montana.

EDWARD HORSKY, Esq., of Helena, Montana.

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A. P. HEYWOOD, Esq., of Helena, Montana.

JAMES A. WALSH, Esq., of Helena, Montana.

D. M. KELLY, Esq., of Boulder, Montana.

A. I. LOEB, Esq., Crocker Bldg., San Francisco, California.

Solicitors for Defendants and Intervenors not Appealing.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2144.

ROBERT S. HALE,

Appellant,

vs.

AMES REALTY COMPANY, a Corporation, et al.,

Appellees.

Order Under Rule 16, Section 1, Enlarging Time to May 18, 1912, to File Record Thereof and to Docket Case.

Good cause therefor appearing, it is ORDERED that the time within which the original certified Transcript of the Record in the above-entitled cause may be filed, and within which the appellant may docket the above-entitled cause with the clerk of this court at San Francisco, California, be and hereby is enlarged to and including the 18th day of May, 1912.

WM. W. MORROW,

United States Circuit Judge for the Ninth Judicial Circuit.

[Endorsed]: No. 2144. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to May 18, 1912, to File Record Thereof and to Docket Case. Filed May 11, 1912. F. D. Monckton, Clerk.

In the District Court of the United States, in and for the District of Montana.

No. 668—IN EQUITY.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation, and ROBERT S. HALE et al.,
Defendants.

BE IT REMEMBERED, that on the 2d day of February, 1903, the complainant filed its Bill of Complaint herein, which is in the words and figures following, to wit: [1*]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation; Helena & Livingston Smelting and Reduction Company, a Corporation; Helena Land and Improvement Company, a Corporation; Chicago Reduction Works, a Corporation; H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockeli, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson,

*Page-number appearing at foot of page of original certified Record.

Antone Semenec, William R. Sherman, Lawrence Wanderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Castner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Strobel, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead, Lind Warnech, Kate Cassidy, G. W. Jensen, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulholland, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clark, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, and J. B. Maxfield,

Defendants.

Bill of Complaint in Equity.

To the Honorable Judges of the Circuit Court of the United States, for the District of Montana:

Your orator, the Ames Realty Company, brings this bill of complaint against the above-named defendants, and thereupon your orator complains and says:

I. That your orator, the Ames Realty Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and is a resident and citizen of [2] the State of Missouri, and not a resident or citizen of any other State.

II. That the Big Indian Mining Company is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and is a resident and citizen of the State of Washington.

III. That the Helena and Livingston Smelting and Reduction Company is a corporation duly organized and existing under and by virtue of the laws of the State of Montana, and is a resident and citizen of the State of Montana.

IV. That the defendant Helena Land and Improvement Company is a corporation duly organized and existing under and by virtue of the laws of the State of Montana, and is a resident and citizen of the State of Montana.

V. That the defendant, Chicago Reduction Works, is a corporation, duly organized and existing under and by virtue of the laws of the State of Illi-

nois, and is a resident and citizen of the State of Illinois.

VI. That the defendant H. M. Hill is a resident and citizen of the State of California.

VII. That the defendant Ole Noer is a resident and citizen of the State of Idaho.

VIII. That the defendants, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenec, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Strobel, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie [3] Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, G. W. Jensen, D. W. Beach, Benjamin Borgstede, M. J. McDaniels, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulholland, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clark, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L.

Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, and J. B. Maxfield, are all residents and citizens of the State of Montana.

IX. And *you* orator further shows unto your Honors that it is authorized by its articles of incorporation to own, enjoy and possess lands and water and water rights, and to use, cultivate and enjoy the same, and that it is the owner, in possession of and entitled to the possession of nineteen hundred twenty-six acres of agricultural lands, situated in Township Ten (10), in Ranges Three (3), Four (4) and Seven (7) West of the Principal Meridian, in the Prickley Pear Valley, in the County of Lewis and Clarke and State of Montana, which said lands, for the purpose of raising crops thereon, require to be irrigated and watered by artificial means. That in order to irrigate said lands for the purposes aforesaid, your orator, its grantors and predecessors in interest, on the first day of April, 1865, by means of certain ditches, tapped the waters of Prickly Pear Creek, in Lewis and Clark County, State of Montana, and carried and conveyed the same to and upon the lands of your orator, now owned and occupied by it, and thereby appropriated for the purposes aforesaid one hundred (100) inches of the waters of [4] the Prickly Pear Creek. That in order to further irrigate said lands for the purposes aforesaid your orator, its grantors and predecessors in interest, on the first day of April, 1866, by means of certain ditches tapped the waters of said Prickly Pear Creek

and carried and conveyed the same to and upon the lands of your orator now owned and occupied by it, and thereby appropriated for the purpose aforesaid one hundred and ni*nty* (190) inches of the waters of said Prickly Pear Creek. That in order to further irrigate said lands for the purposes aforesaid your orator, its grantors and predecessors in interest, on the 6th day of April, 1866, by means of certain ditches tapped the waters of said Prickly Pear Creek and carried and conveyed the same to and upon the lands aforesaid, now used and occupied by your orator, and thereby appropriated for the purposes aforesaid one hundred and sixty-seven (167) inches of the waters of said Prickly Pear Creek.

X. That *you* orator, and its predecessors in interest, have been in the occupation and continued use, enjoyment and possession of the aforesaid respective number of inches of the waters of said Prickly Pear Creek under and by virtue of and through said appropriations ever since the date thereof.

XI. And your orator further shows unto your Honors that all of the lands owned by your orator are under cultivation; that the waters appropriated as aforesaid and now owned and used by your orator are necessary and indispensable in and about the cultivation of crops upon said land and raising and producing hay, grain and vegetables thereon.

XII. And your orator further shows unto your Honors that the defendants and each and every of them claim some right to the use of the waters of said Prickly Pear Creek and its tributaries, all of which

said tributaries empty into the Prickly Pear Creek, above the points of said Prickly Pear Creek where [5] your orator diverts its water, and the waters from the tributaries of said Prickly Pear Creek are necessary and requisite to swell the waters of said Prickly Pear Creek sufficient to enable your orator and other prior appropriators to defendants to satisfy their prior rights.

XIII. And your orator further shows unto your Honors that the defendants, and each and every of them, are appropriating large amounts of the waters of said Prickly Pear Creek and its said tributaries, and threaten to continue to do so, and thereby to diminish and exhaust the waters of said Prickly Pear Creek so that your orator will be deprived of the use and enjoyment of the amount of water so appropriated by it from said Prickly Pear Creek, and requisite and necessary to be used by it in the cultivation of its lands so that your orator will be greatly and irreparably damaged thereby.

XIV. And your orator further shows unto your Honors that any and all the rights which the said defendants, and each and every of them, may have in and to the waters of said Prickly Pear Creek, and to its tributaries, are subsequent, subject and subservient to the rights of your orator.

XV. And your orator further shows unto your Honors that the appropriations of said waters so made by your orator, and its predecessors in interest, are necessary for the purpose of cultivation and irrigation of crops and lands, and that unless the said defendants be enjoined and restrained from divert-

ing and turning away the waters of said Prickly Pear Creek and its tributaries by means of ditches, your orator will be unable to cultivate its lands and raise crops of hay, grain and vegetables thereon.

XVI. And your orator further shows unto your Honors that by reason of the diverse interests of each of the defendants it is necessary that all and every of the claimants to the waters of said Prickly Pear Creek, and to its tributaries, be joined [6] and made defendants herein in order to avoid a multiplicity of suits.

XVII. And your orator further shows unto your Honors that its right to the use of the waters of said Prickly Pear Creek for the purposes aforesaid is of great value and exceeding the sum of Two Thousand Dollars ($2,000.00), and that unless the said defendants are restrained and enjoined from diverting and using the waters of said Prickly Pear Creek, the value and utility of your orator's rights will be destroyed and lost to your orator.

Forasmuch as your orator can have no plain, speedy or adequate relief except in this Court, and to the end therefore that each and all of the parties who appropriated water from the said Prickly Pear Creek, and its tributaries and branches, at a point or points above the place where your orator diverts the said water be required to answer and set up whatever rights they may have in and to the waters of said Prickly Pear Creek, and its branches and tributaries, and make a full disclosure according to their best knowledge, remembrance, information and belief, and a full, true, direct and perfect answer

make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived, to the end that the rights of the respective parties hereto may be established and fixed by decree of this Court; and your orator prays that such decree may be made herein adjudicating the rights of your orator and the rights of the defendants in the premises, so that the said defendants, their servants, officers, agents, attorneys, and employees, and each and every of them, may be restrained and enjoined by order and injunction of this Court from diverting any of the waters of said Prickly Pear Creek, and its branches and tributaries, until the prior rights of your orator to said waters are first [7] satisfied.

And may it please your Honors to grant unto your orator a writ of subpoena issuing out of and under the seal of this Honorable Court, directed to the said defendants, commanding them by a certain day, and under a certain penalty, to be and appear in this Honorable Court, and then and there to answer to the premises and to stand to and abide by such order and decree as may be made against them; and for costs of suit.

And your orator will ever pray.

McCONNELL and McCONNELL,
Solicitors for Complainants and of Counsel. [8]

United States of America,
District of Montana,
County of Lewis & Clarke,—ss.

On this the 31st day of January, A. D. 1903, before the undersigned, a notary public in and for Lewis

and Clarke County, State of Montana, personally appeared O. W. McConnell, who being by me duly sworn, deposes and says: That he is one of the solicitors and of counsel for the complainant, the Ames Realty Company; that he has read the foregoing complaint and knows the contents thereof, and that the same is true to the best knowledge, information and belief of affiant. That the reason this verification is not made by an officer of the complaining corporation is because each and every of said officers are absent from the State of Montana, wherein affiant resides.

O. W. McCONNELL.

Subscribed and sworn to before me this 31st day of January, A. D. 1903.

[Seal] LOUIS PENWELL,

Notary Public in and for Lewis and Clarke County, State of Montana.

[Endorsed]: Title of Court and Cause. Bill of Complaint in Equity. Filed Feb. 2, 1903. Geo. W. Sproule, Clerk. [9]

And thereafter, on February 2, 1903, a subpoena in equity was duly issued herein, which is in the words and figures following, to wit: [10]

[Subpoena.]

UNITED STATES OF AMERICA,

Circuit Court of the United States, Ninth Judicial Circuit of Montana.

IN EQUITY.

The President of the United States of America, Greeting: To Big Indian Mining Company, a Corporation, Helena and Livingston Smelting and Reduction Company, a Corporation, Helena Land and Improvement Company, a Corporation, Chicago Reduction Works, a Corporation, H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christina Nelson, Antone Semenec, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Strobel, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, G. W. Jensen, D. W. Beach, Benjamin Borstede, M.

J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulholland, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clark, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, and J. B. Maxfield, Defendants. [11]

YOU ARE HEREBY COMMANDED, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Helena, on the second day of March, A. D. 1903, to answer a bill of complaint exhibited against you in said court by Ames Realty Company, complainant, who, is a citizen of the State of Missouri, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of FIVE THOUSAND DOLLARS.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 2d day of February, in the year of our Lord one thousand nine hundred and three, and of our Independence the 127th.

[Seal] GEO. W. SPROULE,

Clerk.

MEMORANDUM PURSUANT TO RULE 12, SUPREME COURT U. S.

You are hereby required to enter your appearance in the above suit on or before the first Monday of March next, at the Clerk's office of said Court, pursuant to said bill; otherwise the said bill will be taken *pro confesso.*

[Seal] GEO. W. SPROULE,
Clerk.

McCONNELL & McCONNELL,
Solicitors for Complainant,
Helena, Montana. [12]

United States of America,
State of Montana,
County of Lewis and Clarke,—ss.

Hugh H. Rogan, being first duly sworn according to law, deposes and says: That he is a citizen of the United States, over the age of eighteen years, and in nowise interested in the action of the Ames Realty Company against the Big Indian Mining Company et al.; that he received the annexed subpoena on the 2d day of February, 1903, and personally served the following defendants on the dates mentioned by delivering to each of said defendants personally a copy of said subpoena, to wit: On February 2d, Helena and Livingston Smelting and Reduction Company, Helena Land and Improvement Company, R. S. Hale, T. H. Carter, Antone Semenec; on February 3d, Reynolds Prosser, D. W. Beach and Charles A. Donnelly; on February 4th, I. B. Cutler, Davis C. Turner, William R. Sherman, Lawrence Wonderer, E. L. Marks, Charles B. Zastrow, Harry

Johnson, Trued Swanson, Otto Hofstead; on February 5th, Lind Warneck, Michael Foley, Kate Cassidy, G. W. Jensen, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, and James Boone; on Fenruary 6th, Lizzie Bailey, M. A. Haynes, J. Ellis and Robert Lynnes; on February 7th, John Haab, Edward Heater, Robert Strobel, Margaret P. Roe, Malcolm D. McRae, George Herbert, Herman Freyler, Charles Koegel, H. O. Nash, Anna E. Nash, Chris Wickersham, Perry Parks, Christian Nelson; on February 9th, A. H. Moulton, Marion D. Steves, Charles O'Connell, Martin Broen, Nellie R. Ricketts, James J. Sweet, Asleck Slenes, John J. Hall, George Cockell, I. W. Marks, Chris Robertson, Christine Winslow, J. A. Fischer, William Ogilvie, and Benjamin Wahle; on February 10th, J. B. Maxfield, Gus Ruegg, James H. Mulhollen and John T. Murphy; on February 11th Jacob Kahler, William Bevins, Benjamin Z. Young; on February 12th, Joseph W. Young, John Pohl, James A. Carrier, and James Clegg; on February 14th, B. N. J. Miljouer, and E. J. Harris; on February 16th, Gerhard Thies.

HUGH H. ROGAN.

Subscribed and sworn to before me this the 16th day of February, 1903.

[Notarial Seal] O. W. McCONNELL,

Notary Public in and for Lewis and Clarke County, State of Montana. [13]

United States of America,
State of Montana,
County of Cascade,—ss.

David Ledbetter, being first duly sworn according

to law, deposes and says: That he is a citizen of the United States, over eighteen years of age, and is nowise interested in the action of the Ames Realty Company against the Big Indian Mining Company, et al.; that he received the annexed subpoena on the —— day of February, 1903, and personally served the same upon the defendant Fred Hart on the 23d day of February, 1903, by delivering to said defendant personally a copy of said subpoena.

DAVID LEDBETTER.

Subscribed and sworn to before me this the 23 day of February, 1903.

[Notarial Seal] RICHARD BENNETT,
Notary Public in and for the County of Cascade, State of Montana.

Fees, $1.00. [14]

United States of America,
State of Montana,
County of Cascade,—ss.

T. Rush, being first duly sworn according to law, deposes and says: That he is a citizen of the United States, over the age of eighteen years, and in nowise interested in the action of the Ames Realty Company against Big Indian Mining Company et al.; that he received the annexed subpoena on the 25th day of February, 1903, and personally served the same upon the defendant, William Albright, on the 28th day of February, 1903, by delivering to said defendant personally a copy of said subpoena.

T. RUSH,
Constable.

Subscribed and sworn to before me this, the 2d day of March, 1903.

[Notarial Seal] HENRY L. DESCOMBS,

Notary Public in and for Cascade County, Montana.

Notarial Fee.......................... .50

Constable.............................. .20

[15]

[Endorsed]: No. 668. United States of America, Circuit Court of the United States, Ninth Circuit of Montana. Subpoena. Filed and Entered Mar. 19, 1903. Geo. W. Sproule, Clerk. By Fred H. Drake, Deputy. McConnell & McConnell, Solicitors for Complainant, and of Counsel. [16]

And thereafter, on March 19, 1903, a subpoena toties quoties was duly issued herein, which is in the words and figures following, to wit: [17]

[Subpoena Toties Quoties.]

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana.

IN EQUITY.

The President of the United States of America, Greeting: To Big Indian Mining Company, a Corporation, Peter Leary, Mary Leary, Defendants.

YOU ARE HEREBY COMMANDED, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom, in Helena, Mon-

tana, on the 4th day of May, A. D. 1903, to answer a Bill of Complaint exhibited against you in said court by Ames Realty Company, a corporation, Complainant, who is a citizen of the State of Missouri, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under penalty of FIVE THOUSAND DOLLARS.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 19th day of March, in the year of our Lord one thousand nine hundred and three, and of our Independence the 127th.

[Seal] GEO. W. SPROULE,
Clerk.
By Frederick H. Drake,
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12, SUPREME COURT U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of May next, at the Clerk's office of said Court, pursuant to said Bill; otherwise the said Bill will be taken *pro confesso.*

GEO. W. SPROULE,
Clerk.
By Frederick H. Drake,
Deputy Clerk.

McCONNELL & McCONNELL,
Solicitors for Complainant, Helena, Montana.

United States Marshal's Office,
District of Montana.

I hereby certify, that I received the within writ on the 19th day of March, 1903, and personally served the same on the 25th day of March, 1903, by delivering to, and leaving with Colin McIntosh, Manager of the Big Indian Mining Company in the County of Lewis and Clark and District of Montana, a copy of the within subpoena.

C. F. LLOYD,
U. S. Marshal.
By C. F. Gage,
Deputy Marshal.

[Indorsed]: Title of Court and Cause. Subpoena Toties Quoties. Filed April 14, 1908. Geo. W. Sproule, Clerk. [18]

And thereafter, on July 15, 1903, the Answer of defendant, R. S. Hale, was duly filed herein, being in the words and figures following, to wit: [19]

[Answer of R. S. Hale to Bill.]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation, Helena and Livingston Smelting and Reduction Company, a Corporation, Helena Land and Improvement Company, a Corporation, Chicago Reduction Works, a Corporation, H. M. Hill, Ole Noer, Perry Parks,

James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenec, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Strobel, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, G. W. Jensen, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, Willian Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris. Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clark, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, and J. B. Maxfield,

Defendants. [20]

The answer of R. S. Hale to the bill of complaint of the Ames Realty Company, complainant.

The defendant, R. S. Hale, now and at all times hereafter, saving and reserving unto himself all benefit and advantage of exception which can or might be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto or to so much and such parts thereof as this defendant is advised it is material or necessary for him to make answer unto, answering says:

1. This defendant admits the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of complainants bill of complaint.

2. This defendant has not sufficient knowledge or information concerning the allegations or any thereof contained in paragraph 9 of complainant's bill of complaint and therefore denies the same.

3. This defendant admits that he claims a right to the use of a portion of the waters of Prickly Pear Creek and its tributaries as is hereinafter more fully set forth and alleged, and that the tributary from which this defendant takes and obtains the water used by this defendant is above the points on said Prickly Pear Creek where the complainant diverts its water, but denies that the waters from the tributary of said Prickly Pear Creek to the use of which this defendant is entitled are necessary or requisite to swell the waters of said Prickly Pear Creek sufficient to enable the complainant or any other appropriator to set out the rights to which they are entitled.

4. This defendant admits that this defendant is appropriating large amounts of the waters of said Prickly Pear Creek and a tributary thereof, but denies that this defendant is using or has at any time used any waters of said Prickly Pear Creek or any tributary thereof to which the complainant is in any way or manner, or to any extent [21] whatever entitled.

5. This defendant denies that the right of this defendant is subject, subsequent or subservient to the rights of the complainant, and avers to the contrary that this defendant's rights as herein set out are prior and superior to any right of the complainant in and to any of the waters of said Prickly Pear Creek and its tributaries.

6. This defendant denies each and every material allegation in said complainant's complaint contained, not herein otherwise specifically admitted or denied.

And this defendant for further answer to the complainant's said bill of complaint alleges and sets forth:

1. That this defendant is a citizen of the United States of America, and is now, and through his grantors and predecessors in interest has been, ever since the year 1869, the owner in the possession and entitled to the possession of a certain mining ditch known as the Park Ditch, commencing at the intersection of said ditch with Lump Gulch Creek in the County of Jefferson, at a point about 200 feet below the junction of the said Lump Gulch Creek and the waters from Park Lake, extending thence into the County of Lewis and Clarke, in the State of Mon-

tana, by means whereof the said defendant, his grantors and predecessors in interest, did on the first day of March, 1864, appropriate and divert all the waters of Lump Gulch, being about five hundred inches, and did and does carry and convey said waters and use the same upon divers and sundry mining lands, and other lands belonging to this defendant and others, in the County of Lewis and Clarke, State of Montana, for [22] the purpose of mining and developing said mining claims and for agricultural, domestic and other useful purposes, and that the said waters have been so used by this defendant, his grantors and predecessors in interest continuously, uninterruptedly, for mining and other useful purposes, since the date of appropriation thereof, and that the right of the said defendant to the use of said waters and all of said waters of said Lump Gulch Creek, the same being a tributary of Prickly Pear Creek, for mining, agricultural, mechanical, domestic and other useful purposes, and the right to reservoir and store said waters for said purposes is superior to any and all rights of the said complainant and each and every of this defendant's codefendants in said action.

Wherefore this defendant having fully answered the said complain*at*'s bill of complaint, asks to be dismissed with his costs in this behalf expended.

R. S. HALE.

Defendant.

MASSENA BULLARD,

Solicitor for Defendant, R. S. Hale.

Due service of foregoing answer and receipt of copy acknowledged this fifteenth day of July, 1903.

McCONNELL & McCONNELL,
Solicitors for Complainant. [23]

[Endorsed]: No. 668. In the Circuit Court of the United States, Ninth Circuit, District of Montana. Ames Realty Company, a Corporation, Complainant, vs. Big Indian Mining Company, a Corporation, et al., Defendants. Answer of Defendant R. S. Hale. Filed July 15, 1903. Geo. W. Sproule, Clerk. Masena Bullard, Attorney for Defendant, R. S. Hale, Helena, Montana. [24]

And thereafter, on July 15, 1903, the Cross-bill of defendant R. S. Hale was duly filed herein, which is in the words and figures following, to wit: [25]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN ~~MINING~~ COMPANY, a Corporation, Helena and Livingston Smelting and Reduction Company, a Corporation, Helena Land and Improvement Company, a Corporation, Chicago Reduction Works, a Corporation, H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James

J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenec, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Strobel, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, G. W. Jensen, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clark, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, and J. B. Maxfield,

Defendants. [26]

Cross-Bill of Complaint in Equity [of R. S. Hale].

To the Honorable Judges of the Circuit Court of the United States, for the District of Montana:

Your orator R. S. Hale, of Helena, Lewis and Clarke County, State of Montana, and a citizen of the United States and a resident of the State of Montana, brings this his cross-bill of complaint against the above-named complainant, Ames Realty Company, a corporation, and his codefendants mentioned and named in said above-entitled cause, and thereupon your orator complains and says:

That heretofore, to wit, on the 2d day of February, A. D. 1903, the said Ames Realty Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Missouri, filed its bill of complaint in this Honorable Court against your orator, and against all of the said above named and mentioned defendants, all of whom are residents and citizens of the State of Montana, except the said Big Indian Mining Company, a corporation, a resident and citizen of the *of the* State of Washington, and the said Chicago Reduction Works, a corporation, which is a resident and citizen of the State of Illinois, and the said H. M. Hill, who is a resident and citizen of the State of California, and the said Ole Noer, who is a resident and citizen of the *State Idaho,* in which, its said bill of complaint, it is alleged by the Ames Realty Company, complainant therein, that it is the owner of Nineteen hundred and twenty-six acres of agricultural lands in township number ten (10), in range number three (3),

four (4) and seven (7), west of the Pr*ic*ipal Meridian, in the Prickly Pear Valley, Lewis and Clarke County, Montana, which, for the purpose of raising crops thereon, require to be irrigated and watered by artificial means. That it is therein further alleged that in order to irrigate said lands for the purpose of raising crops thereon, said Ames Realty Company, its grantors and predecessors in interest appropriated certain waters from Prickly Pear Creek, in the County of Lewis and Clarke, State of Montana, and [27] carried and conveyed the same to and upon its said lands, which said waters, it is alleged, are requisite and necessary to properly irrigate said lands and raise crops thereon. That it is further alleged in said bill of complaint that your orator and his said codefendants mentioned therein claim some right to the use of said waters of said Prickly Pear Creek and its tributaries, and are appropriating large amounts of the waters of said Prickly Pear Creek and its tributaries, but that the rights of your orator are subsequent, subject and subservient, to the rights of said complainant in said bill of complaint, the Ames Realty Company praying that a decree of this Honorable Court be entered adjudicating the rights of the said complainant, Ames Realty Company, and the rights of your orator and his codefendants therein, so that the defendants named in said bill of complaint, their servants, officers, agents, attorneys, and employees may be restr*ia*ned and enjoined by order and injunction of this Court from diverting any of the waters of said Prickly Pear Creek, and its branches and tributaries

until the alleged prior rights of said complainant in said bill of complaint to said waters are first satisfied.

And your orator further shows that he has served and filed his separate answer to said bill of complaint, and that the said cause has not yet been heard, and that to the end that the rights of your orator, and the said complainant and the defendants mentioned and named in said bill of complaint and herein shall be fully adjudicated, and their rights in and to the said waters of the said Prickly Pear Creek and its tributaries and branches be established and finally decreed, it is necessary that your orator exhibit and file this, his cross-bill of complaint against the complainant in said bill of complaint, and against each of his said codefendants mentioned in said above entitled cause. [28]

And your orator further shows unto your Honors that the said Ames Realty Company is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri; that the said Big Indian Mining Company is a corporation duly organized and existing under and by virtue of the laws of the State of Washington; that the Helena and Livingston Smelting and Reduction Company is a corporation duly organized and existing under and by virtue of the laws of the State of Montana, and the Chicago Reduction Works is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois. That the said H. M. Hill, is a resident and citizen of the State of California, that the said Ole Noer is a resident and citi-

zen of the State of Idaho, and that all of the others of your orator's codefendants are residents and citizens of the State of Montana.

And your orator further shows unto your Honors that your orator is a citizen of the United States of America and is now and ever since the 19th day of January, 1875, has been the owner in the possession and entitled to the possession of that certain ditch known as the Park Ditch leading from the Park Lake and Lump Gulch in the County of Jefferson, State of Montana, to the Park mines near Unionville, in Lewis and Clarke County, and to other mining lands and agricultural lands in said Lewis and Clarke County, and that your orator is the owner of large tracts of mining ground and property in said Lewis and Clarke County, upon which mining ground your orator, his grantors and predecessors in interest have, during all the years since and including the year 1875 used water through said ditch for the purpose of mining, developing, and exploring said mining ground; that said ditch taps and intersects the waters of said Lump Gulch Creek and said Park Lake and carries and conveys all of said waters to and upon said mining ground, and upon other real estate lying along the line of said ditch and in the vicinity thereof.

And your orator further shows unto your Honors that your orator, his grantors and predecessors in interest, have been by prior appropriation, the owners of all the said waters of Lump Gulch [29] and Park Lake above the point where said waters are intersected by the said Park Ditch and of the right

to use said waters for mining, agricultural, domestic, mechanical and other useful purposes, ever since the first day of March, 1864, and ever since the nineteenth day of January, A. D. 1875 has been in the actual, continuous and exclusive use of said waters and in the open and notorious possession and enjoyment thereof as against the plaintiff, its grantors and predecessors in interest, and as against each of this defendant's codefendants and their and each of their grantors and predecessors in interest, and against every person whomsoever, and is entitled to the use and enjoyment of said waters as well against the plaintiff herein as against each of this defendant's codefendants.

And your orator further shows unto your Honors that the said complainant and all of your orator's codefendants mentioned in said complainant's bill of complaint claim some right, title or interest by virtue of appropriation to the use of the waters of said Prickly Pear Creek and its tributaries, and are using the same. That the value of the right of your orator to the use of said waters for the purposes aforesaid exceeds the sum of two thousand dollars. That the right of said complainant and said codefendants to the use of the waters of said Prickly Pear Creek and its tributaries, are subordinate and subservient to the rights of your orator to use the waters of said Lump Gulch Creek and Park Lake. That it is necessary that a decree of this Court be made and entered in which it shall be adjudicated and determined the amounts of water to which your orator and the said complainant, and the said several defendants herein

named are entitled to use, according to their several rights and priorities in the use of the same, and that your orator's right and title to the use of the said waters of Lump Gulch Creek and Park Lake be quieted by decree of this Court.

Forasmuch as your orator can have no adequate relief, except in this Court, and to the end therefore that the complainant and the defendants may, if they can, show cause why your orator should not have the relief hereby prayed, and may make full disclosure according [30] to their best knowledge, remembrance, information and belief, and a full, true, direct and perfect answer make to the matters hereinbefore set out, but not under oath, an answer under oath being hereby expressly waived.

Your orator prays that such decree may be made herein adjudicating the rights of your orator and the rights of the complainant and the defendants in the premises in and to the waters of said Prickly Pear Creek and its tributaries, and for an injunction restraining the said complainant mentioned in said bill of complaint and other parties to this suit, their servants, agents, attorneys, and employees, and each and every of them, from in any manner interfering with the rights of your orator, to the end that he may have the use of the waters of said Lump Gulch Creek and Park Lake and its tributaries, according to his rights as herein set forth and alleged. And may it please your Honors to grant unto your orator a writ of subpoena, issued out of and under the seal of this Court, directed to the said complainant in said bill of complaint and your orator's codefendants men-

tioned therein, commanding them by a certain day and under the penalty prescribed by law to be and appear in this Honorable Court, and there and then to answer to the premises, but not under oath, an answer under oath being hereby expressly waived, and to stand to and abide such order and decree as may be made against them, and for costs of suit, and your orator prays for such further relief as to this Honorable Court may seem meet and equitable.

And your orator will ever pray.

MASSENA BULLARD,

Solicitor for the Defendant, and Cross-complainant, R. S. Hale.

United States of America,
State and District of Montana,
County of Lewis and Clarke,—ss.

On this fourteenth day of July, A. D. 1903, before me, a Notary Public in and for Lewis and Clarke County, Montana, personally [31] appeared R. S. Hale, who being by me duly sworn, deposes and says: That he is one of the defendants in the above-entitled case, and the complainant in the foregoing cross-bill; that he has read the foregoing cross-bill, and knows the contents thereof, and that the same is true, except as to the matters and facts therein stated on information and belief, and as to such matters he believes it to be true.

R. S. HALE.

Subscribed and sworn to before me this fourteenth day of July, A. D. 1903.

MASSENA BULLARD,

Notary Public in and for Lewis and Clarke County, State of Montana.

Service of the foregoing cross-bill accepted and copy received this fourteenth day of July, 1903.

McCONNELL & McCONNELL,

Solicitors for Complainant, Ames Realty Company. [32]

[Endorsed]: No. 668. Ames Realty Company, a Corporation, Complainant, vs. Big Indian Mining Company, a Corporation, R. S. Hale et al., Defendants. Cross-bill of Complaint in Equity of R. S. Hale. Filed July 15th, 1903. Geo. W. Sproule, Clerk. Massena Bullard, Attorney for Cross-complainant, Helena, Montana. [33]

And thereafter, on August 28, 1907, statement as to title to lands of defendant Robert S. Hale was duly filed herein, being in words and figures as follows, to wit: [34]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY et al.,
Defendants.

Statement as to Title to Lands of Defendant, Robert S. Hale.

The defendant, Robert S. Hale, makes the following statement as to the title to lands owned by him and embraced in the above-entitled action;

The said defendant, Robert S. Hale, is the owner

and he and his grantors and predecessors in interest have for more than thirty-two years owned the lands mentioned and referred to in this defendant's cross-bill of complaint on file herein, which lands are situated in Jefferson County and in Lewis and Clark County, State of Montana, and are particularly described as follows, to wit:

In Lewis and Clark County:

Survey number 843, containing twelve (12) acres.

2/3 of Lot 45, Survey number 407, containing thirty (30) acres.

Part of Lots 54 and 98, Survey number 1514, containing twenty (20) acres.

Survey number 444, containing thirty-three and fifty one-hundredths (33.50) acres.

Mineral Entry, number 2354, containing eighty-eight and fifty one-hundredths (88.50) acres.

Survey number 767, containing sixty-two and twenty-six one-hundredths (62.26) acres.

Survey number 101, containing sixteen and twenty-six one-hundredths (16.26) acres.

Survey number 442, containing thirty-nine and forty-seven one-hundredths (39.47) acres.

Survey number 388, containing eleven and seventeen one-hundredths (11.17) acres. [35]

Survey number 30, containing eight and twenty-one one-hundredths (8.21) acres.

Survey number 2626, containing twenty (20) acres.

Part of Survey number 880, containing fifty-six (56) acres.

All of the foregoing lands are in township number nine, north of range number four west.

In Jefferson County:

Lot eight, Survey number 752, containing ninety-five and eighty-eight one-hundredths (95.88) acres, in township number eight, north, of range number four west.

That this defendant, his grantors and predecessors in interest have for more than thirty-two years last past continuously occupied, used and enjoyed said mining claims, and have used for the purpose of working, operating and mining said property, the waters conveyed by the Park Ditch mentioned and referred to in this defendant's said cross-bill of complaint, and that this defendant is now using said waters.

MASSENA BULLARD,
Solicitor for Defendant Robert S. Hale.

[Indorsed]: Title of Court and Cause. Statement as to Title to Lands of Defendant Robert S. Hale. Filed Aug. 28, 1907. Geo. W. Sproule, Clerk. **[36]**

And thereafter, on April 14, 1908, a stipulation as to testimony was duly filed herein, which is in the words and figures following, to wit: [37]

[Stipulation as to Testimony.]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation, Helena & Livingston Smelting and Reduction Company, a Corporation, Helena Land and Improvement Company, a Corporation, Chicago Reduction Works, a Corporation, H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Anotne Semenec, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Stroble, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead,

Lind Warneck, Kate Cassidy, C. W. Jensen, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris. Robertson, Chris. Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clarke, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, and J. B. Maxfield,

Defendants. [38]

It is hereby stipulated and agreed between the parties to the above-entitled action as follows:

1. That said action may be tried to the Court without a jury, the parties hereby expressly waiving a jury in said action, and that the testimony in said action may be taken before H. A. Van Horn, a commissioner hereby appointed for the purpose of taking said testimony. That said commissioner shall have power to administer oaths, and after reducing the testimony to writing, the whole of said testimony shall, on or before the first day of June, 1907, be submitted to the Judge of said court for findings of fact and conclusions of law.

2. That the complainant may have thirty days

from the first day of February, 1907, within which to take its testimony in said action, and the defendants and intervenors may have until the first day of June, 1907, within which to take their testimony. Provided, that the time herein provided may be extended by the Court for good cause.

3. The following shall be taken and held to be facts in said action without the necessity of introducing any proof with reference thereto, and shall be considered of the same effect as if conclusively established by competent and sufficient testimony:

a. That each party corporation is a corporation duly incorporated as alleged in the pleading of such party.

b. That the title to the lands of the several parties, complainant and defendants, shall be and is conceded to be as set out in the bill of complaint or answer, or cross-complaint, or complaint in intervention, as the case may be, of the respective parties, unless proof of title shall be required as hereinafter provided.

c. That the lands of the respective parties are dry and arid and require artificial irrigation for their successful [39] production of agricultural crops thereon; that those owning placer mines require water for the operation of the same.

4. Each allegation in each answer, cross-complaint or complaint in intervention, except as herein otherwise admitted, shall be deemed to be denied in all respects as fully and with like effect as if a replication or answer thereto had been filed, and it shall therefore be unnecessary for any party to the action to file a replication to any answer of any party, or in

answer to his cross-complaint, or complaint in intervention.

5. Any party may, if he thinks proper, file a written statement as to the title to his lands, or an abstract of title to his property, and such statement or abstract of title, or the allegations in the pleadings of such party to his title and description of his lands shall be taken as correctly describing the lands of such party and his title thereto, unless controverted by some other party after due notice. If controverted, demand in writing shall be made upon the party to present proof relative to his title or the description of his property, or both, and such demand shall be served upon such party or his attorney at least three days before he shall be required to offer testimony in response to such demand.

Dated January 22, 1907.

McCONNELL & McCONNELL,
Solicitors for Complainant.

EDWARD HORSKY,
Solicitor for Certain Defendants.

H. S. HEPNER,
Solicitor for Certain Defendants.

ALBERT J. GALEN and GALEN & METTLER,
Solicitors for Certain Defendants. [40]

C. A. SPAULDING,
Solicitor for Defendant Strobel.

A. P. HEYWOOD,
Solicitor for Certain Defendants.

H. G. & S. H. McINTIRE,
Solicitor for Certain Defendants.

A. K. BARBOUR,

Solicitor for Certain Defendants, Helena & Livingston S. & R. Co.

CARL RASCH,

Solicitor for Certain Defendants.

LEON A. LA CROIX,

Solicitor for Certain Defendants.

T. J. WALSH,

Solicitor for Certain Defendants.

M. S. GUNN,

Solicitor for Certain Defendants.

MASSENA BULLARD,

Solicitor for Certain Defendants.

ALBERT I. LOEB,

Solicitor for Certain Defendants.

D. M. KELLY,

Solicitor for Christ Olsen.

W. D. TIPTON,

Solicitor for Interveners D. A. G. Flowerree et al.

[Indorsed]: Title of Court and Cause. Stipulation for Taking Testimony as to Pleadings and as to Admitted Facts. Filed April 14, 1908. Geo. W. Sproule, Clerk. [41]

That on October 16, 1903, the Depositions of Patrick Woods and D. A. G. Flowerree were duly filed herein, being in the words and figures following, to wit: [42]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation, R. S. HALE et al.,
Defendants.

Stipulation [Re Depositions of D. A. G. Flowerree and Patrick Woods].

It is hereby stipulated and agreed that the depositions of D. A. G. Flowerree and Patrick Woods, witnesses of defendant, R. S. Hale, in the above-entitled action, may be taken at the law office of Massena Bullard, Room 8, Gold Block, Helena, Montana, before any notary public in and for Lewis and Clarke County, Montana, on Tuesday, September 8, 1903, commencing at the hour of ten o'clock A. M. of said day, and if not completed on that day may be continued from day to day and over Sundays until completed, and that when so taken the same may be read in evidence on the trial of said cause, it being expressly stipulated that notice of the taking of said depositions is hereby waived, and said depositions may be taken in all respects the same and with like effect as if due and regular notice had been given and served, reserving the right to all parties to object

to any and all questions and answers at the time of the trial of said action the same as if said parties were present in court and testifying.

Dated September 3, 1903.

McCONNELL & McCONNELL,
Attorneys for Complainant.

ASHBURN K. BARBOUR,
Atty. for Helena & Livingston Smelting & Reduction Company.

EDWARD HORSKY,
Atty. for Defendants Chris Wickersheim, Jas. Mulholland, and Geo. Thies.

SHOBER & RASCH,
Solicitors for About 16 Defendants.

H. S. HEPNER,
Solicitor for Defts. H. M. Hill, Chas. B. Zastrow and L. Wonderer.

M. S. GUNN,
Atty. for Certain Defendants.

A. P. HEYWOOD,
C. A. SPAULDING,
Attys. for Robert Strobel.

NOLAN & LOEB.

LEON A. LACROIX. [43]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation et al.,
Defendants.

Deposition of Patrick Woods.

BE IT REMEMBERED: That pursuant to the stipulation hereunto annexed, and on the eight day of September, A. D. 1903, at ten o'clock A. M. of said day, at the office of Massena Bullard, Room 8, Gold Block, in the city of Helena, Lewis and Clarke County, State of Montana, before me, J. Miller Smith, a notary public in and for said county of Lewis and Clarke, duly appointed and commissioned to administer oaths, etc., personally appeared PATRICK WOODS, a witness produced on behalf of the defendant, R. S. Hale, in the above-entitled action, now pending in the said court, who being first by me duly sworn, was then and there examined and interrogated by Massena Bullard, Esq., of counsel for the defendant, R. S. Hale, and by Odell W. McConnell, Esq., of counsel for the said complainant, and testified as follows:

Question. State your name, age, place of residence and occupation.

Answer. My name is Patrick Woods. Age is eighty-three. Farmer. My residence is now Hardy, Montana.

Question. How long have you resided in what is now the State of Montana?

Answer. Since the fall of 1864.

Question. You may state whether you at any time resided in the Prickly Pear Valley in Lewis and Clarke County, Montana, and if so, when?

Answer. I settled in Prickly Pear Valley in the first of April, 1865, and remained there until about

(Deposition of Patrick Woods.)

'69. I then moved to Missouri [44] River Valley. I think in 1870 I came back to Prickly Pear Valley and resided near the old place that I first settled, and bought out the Rexford ranch.

Question. Is the Rexford ranch what was subsequently known as the Stuart ranch?

Answer. Yes, sir.

Question. Please state whether you were acquainted at any time with A. M. Woolfolk, John H. Ming, John Kinna, D. A. G. Flowerree, T. A. Ray and W. L. Steele.

Answer. Acquainted with all of them.

Question. How long have you known them?

Answer. I've known them since 1865 or '6, or about all of them since I came to the country.

Question. State whether you were acquainted with all of the parties I have named during the years 1869, 1870, 1871 and 1872.

Answer. Yes, sir.

Question. State whether during the years that I have named you were acquainted with what is known as Lump Gulch in Jefferson County, Montana.

Answer. Yes, sir.

Question. State whether during the years above named you were acquainted with what is known as the Park Ditch enterprise.

Answer. I was.

Question. Who was particularly connected with that enterprise?

Answer. Well, I do not know that I can mention all of them, but Mr. Woolfolk was one. There was

(Deposition of Patrick Woods.)

a stream, I think, was the Park Ditch, by its waters. My understanding is that they were the headwaters of Lump Gulch, but there was a lake up there, or reservoir.

Question. State whether during the years I have named you were acquainted with any of the water rights of Prickly Pear Creek in Jefferson County.

Answer. Well, I presume I was acquainted with them. I was [45] there and was farming and of course we all knew who had water rights.

Question. State whether at any time during the years I have named you recall any transactions relative to the waters of Lump Gulch and the Park Ditch.

Counsel for the complainant objects to the witness testifying relative to any matters which were reduced to writing unless a copy of the writing is produced.

Mr. McCONNELL (Continuing).—For the reason that it would not be the best evidence, the written instrument itself being the best evidence of the matter about which the witness is asked to testify.

Answer. Yes, sir, I did.

Question. State in your own language and to the best of your memory what these transactions were and how they arose.

Counsel for the complainant interposes the same objection as to the previous question.

Answer. Well, my recollection about that is that Woolfolk came to me and said they wanted to secure from the ranchers in the valley their promise to let the Park Ditch have the use of that water up at the

(Deposition of Patrick Woods.)

head of Lump Gulch and its tributaries, and that we turned out and canvassed the valley and got the consent of the ranchmen that then had water rights, that they would waive their priority for the benefit of the ditch. At that time we was in very *straight* circumstances and we got everyone we could that was willing to do anything to encourage any enterprise that looked like it would produce any good effect for the farmers. They consented they would give the use of the water.

COUNSEL FOR THE COMPLAINANT.—We object and move to strike it out, for the reason that it is hearsay and that it is irrelevant, incompetent and immaterial.

Mr. BULLARD (Continuing).—What have you to say as to whether the prior appropriators of the Prickly Pear Valley did at that time or not consent to that arrangement and waive their prior rights?

Question by Mr. McCONNELL, Counsel for Complainant.—Was there a written instrument signed by the parties? [46]

Answer. I think there was.

Counsel for complainant objects to any further examination upon this matter until the written instrument alleged to have been signed is produced, inasmuch as that is the best evidence that all water rights were given to the defendant, R. S. Hale, effecting these water rights.

(Mr. BULLARD Continuing:)

Answer. Yes, sir, I think they all consented to it.

Question. If you can remember the names of

(Deposition of Patrick Woods.)

any of these appropriators, who, to your knowledge, did consent in writing to the arrangement you have mentioned, please give the names as far as you can.

Answer. Well, I don't know that I can recall all of them but I know the names. There is James Fergus, Shelton Duff, James Anthony, Thomas Thorp, Harry Neafus, W. L. Millegan, and there may be some others that I can't recall. I can't recall them all.

Question. What have you to say with reference to the owner of the appropriator subsequently known as the Dallas ranch?

Answer. Well, that was formerly belonging to my son in laws, Neafus.

Question. What action did you take as to your right at that time?

Answer. I yielded to the demand, and Mr. Bywaters and it appears to me like there was some person else by the creek also that lived on the adjoining ranch. I forgot who occupied it then. I forgot the name now. I know I never heard any dissatisfied voice from any of them, but it appeared to be that every one was willing to sign the paper.

Question. Do you remember as to the owner of what was known as the Jones ranch and the Bywaters ranch?

Answer. They all participated in this agreement. Yes, sir.

Cross-examination by O. W. McCONNELL, Esq., for Complainant.

Question. You say, Mr. Woods, that this consent

(Deposition of Patrick Woods.)

was in writing?

Answer. Yes, sir. That is my recollection. There was a paper taken around.

Question. Can you give us the substance of this writing?

Answer. Oh, I could not, Mr. McConnell. It was just that they [47] gave their consent in writing that the Park Ditch, as it was then called, was to have the right to use water for the purpose of mining.

Question. Is it not a fact, Mr. Woods, that it was represented to the ranchers that the Park Ditch would store the water in a reservoir and would thereby furnish more water to the ranchers by storing it in a reservoir, and that it would not in any way interfere with the use of the water by the ranchers, but would let it come down the Hale Gulch?

Answer. Well, Mr. McConnell, I could not state how that instrument was drawn. It's *to* long ago. I could not give you a sensible answer to that at all.

Question. There was no consideration *based* to you and so far as you know to the others?

Answer. I think not to any of them. I never heard of any.

Question. You would not have voluntarily given away any of your rights to the use of the water under and of the value of it in the valley, would you?

Answer. Well, I tell you how I felt at that time. I was willing to do almost anything that would help the farmers to dispose of what they could raise.

Question. You did not think you were giving away any of your water rights?

(Deposition of Patrick Woods.)

Answer. I did not know as we were giving away our water rights in that way.

Question. And you did not expect it to interfere in any way with your water rights?

Answer. I did not know at that time what was best. Yes, sir.

Question. Was there plenty of water?

Answer. There was not very many water rights and people did not think there ever would be. That's about the way we looked at it.

Question. You all had plenty of water up to that time?

Answer. Yes, sir. I was one of the appropriators and at that time, Mr. McConnell, there were very few ditches. In fact, I do*d*n't think but one or two were taken out above the head of our ditch. There was [48] six or seven of us that took out the water in what we called the company ditch. We never had any trouble about water at that time.

Question. Where did the water from Lump Gulch and the Park Ditch come into the Prickly Pear?

Answer. It may have been at different places. Some mining was done on Clark Creek, some was done on Holmes Gulch and some on Big Indian, and the water came down this gulch. I never went ar*a*ound to look at it.

Question. Is it not a fact, Mr. Woods, that after you signed this agreement the water of Lump Gulch continued to flow down to the Prickly Pear Creek?

Answer. Mr. McConnell, I answered that ques-

(Deposition of Patrick Woods.)

tion. I never had occasion to go up above the head of our ditches to see whether the water was coming from Lump Gulch or not.

PATRICK WOODS.

Subscribed and sworn to before me this eighth day of September, 1903.

[Notarial Seal] J. MILLER SMITH,

Notary Public in and for Lewis and Clarke County, State of Montana.

BE IT REMEMBERED: That by agreement of the parties the further taking of depositions under said stipulation is continued until the tenth day of October, 1903, then to be continued at the same place and at ten o'clock A. M. of said day, at which time it is agreed that the deposition of D. A. G. Flowerree, named in said stipulation, may be taken.

Dated September 8, 1903.

[Notarial Seal] J. MILLER SMITH,

Notary Public in and for Lewis and Clarke County, State of Montana.

BE IT REMEMBERED: That by agreement of the parties the further [49] taking of depositions under said stipulation is continued until the thirteenth day of October, 1903, then to be continued at the same place at two o'clock P. M. of said day, at which time it is agreed that the deposition of D. A. G. Flowerree may be taken.

Dated October 10, 1903.

[Notarial Seal] J. MILLER SMITH,

Notary Public in and for Lewis and Clarke County, State of Montana.

Deposition of D. A. G. Flowerree.

BE IT REMEMBERED: That on the thirteenth day of October, 1903, at two o'clock P. M. of said day, and at the law office of Massena Bullard, Room 8, Gold Block, Helena, Montana, the taking of depositions under the foregoing stipulation was resumed pursuant to agreement, and thereupon personally appeared D. A. G. FLOWERREE, a witness produced on behalf of the defendant, R. S. Hale, in the above-entitled action, now pending in said court, who being first by me duly sworn, was then and there examined and interrogated by Massena Bullard, Esq., of counsel for the defendant, R. S. Hale, and by Odell W. McConnell, of counsel for the said complainant, and testified as follows:

Question. State your name, age, place of residence and occupation.

Answer. Well, I was born in 1835, Ralls County, Missouri. My name is D. A. G. Flowerree. I reside at Helena, Montana. Stock-grower.

Question. How long have you resided in what is now the State of Montana?

Answer. Since the sixteenth day of March, '64.

Question. State whether at any time you resided in the Prickly Pear Valley in Lewis and Clarke County, Montana, and if so when.

Answer. I never lived in there; I lived in Helena.

Question. State if at any time you were interested in any property in Prickly Pear Valley; and if so how long have you been interested in *i*

Answer. Yes, sir. I have had it in my possession, since '65, I think. [50]

(Deposition of D. A. G. Flowerree.)

Question. State whether you were acquainted at any time with A. M. Woolfolk, John H. Ming, John Kinna, Thomas A. Ray and William Steele.

Answer. I am, with all of them.

Question. How long have you known these gentlemen?

Answer. I have known them since I was connected with them in '67. Along about '69 or '70, the latter part.

Question. State whether or not you were acquainted with all the parties I have named during the years 1869, 1870, 1871, and 1872.

Answer. Yes. I was acquainted with all of them during all those years.

Question. State whether during the years I have named you were acquainted with what was known as Lump Gulch in Jefferson County, Montana.

Answer. I was.

Question. State whether during those years you were acquainted with what is known as Park Ditch enterprise.

Answer. I was.

Question. Who was particularly connected with this enterprise?

Answer. Well, there was Jesse Taylor, John Ming, Tom Ray, Sam Hauser, Colonel Woolfolk, John Kinna, R. S. Hale and myself.

Question. Describe as fully as you can remember the Park Ditch as to the waters it tapped and the country it covered?

Answer. Well, I have not been there, since I got

(Deposition of D. A. G. Flowerree.)

loose from it. It is taken from Lump Gulch, brought a distance into a lake. It was a natural lake, I think, and the ditch went from there to the head of the Park Basin.

Question. State whether during the years I have named you were acquainted with any of the water rights of Prickly Pear Creek in Jefferson County and Lewis and Clarke County.

Answer. Yes, I was acquainted with the water rights in Lewis and Clarke County. Not all of them, but many of them.

Question. State whether at any time during the years I have [51] named you recall any transactions relative to the waters of Lump Gulch and the Park Ditch and the rights of the parties having irrigating ditches below there.

By Mr. McCONNELL.—Were the transactions relative to the Lump Gulch and the Park Ditch, which counsel has asked you, in writing?

Answer. To the best of my knowledge, there was.

Counsel for the complainant objects to any testimony regarding the written instrument for the reason that the written instrument itself is the best evidence of its contents and any testimony given by this witness would be hearsay and irrelevant, incompetent and immaterial.

Mr. BULLARD (Continuing).—You may state whether you know where that paper now is.

Answer. I have no idea in the world where it is.

Question. Have you ever seen it since that time?

Answer. It was turned over to Doc. Steele and

(Deposition of D. A. G. Flowerree.)

Jim Caldwell, a partner of mine, who had a ranch. What they did with it, I don't know. I don't know as ever I saw it afterwards. James Fergus signed it, and the paper was turned over to Doc. Steele and Caldwell.

Question. What was the purport of that paper? Give its terms as you can remember it.

Counsel for the complainant objects on the same grounds as interposed above.

Answer. I very distinctly remember that part of it, and the conditions of the country existing at that time. That we give all of the rights that we possessed in Lump Gulch to the Park Ditch Company. That we give all the water rights that we possess in the waters of Lump Gulch to the Park Ditch, and the tributaries of Lump Gulch.

Question. What was the consideration for that relinquishment?

COUNSEL FOR THE COMPLAINANT.—To that we object as presuming the consideration, and that it is in evidence that no consideration whatever existed.

Mr. BULLARD (Continuing).—What, if any, consideration was there for the relinquishment of the rights you have mentioned?

Answer. Why that these waters would be brought into the Park [52] Ditch and to the head of Dry Gulch and those mines would be worked and give employment for men.

Question. What have you to say as to whether you relinquished your right also at that time?

(Deposition of D. A. G. Flowerree.)

Answer. I did. I talked with every man there was in the valley. There was one man kicked a little while, but he signed, but I think all of them made the agreement. Another man, I don't remember his name, first objected, but afterward signed.

Question. I will be glad if you can recall some of the names of the farmers that you talked with and who informed you that they had made this arrangement?

COUNSEL FOR THE COMPLAINANT.—To that we object, for the reason that the best evidence of that would be the paper itself signed by the parties and for the reason that Mr. Flowerree testified that he only saw and knew of his personal knowledge of one man signing it, being James Fergus, and the other being hearsay.

Answer. Why, here's Doc. Steele. There's old man Woods, and Bywaters, Woods' son in laws, Thomas Thorp and Harry Neafus, old man John Jones. Shelton Duff was in favor of it. Anthony, Mr. Woods talked to him.

Mr. BULLARD (Continuing).—State what you know with reference to the owners of water in Lump Gulch below the head of the Park Ditch or above it.

Answer. Well, I could not, one of these men's names. Well, I knew them, that is all, I think about *the*. I can tell you what they said to us at that time. There was two parties that went down with them. There was only one man that I was well acquainted with at that time. I didn't know his name; and the other ones, well, I knew them by sight. I talked to

(Deposition of D. A. G. Flowerree.)

Jim Ax. I says to him, "What are you doing here, any good?" He says, "No, I am not. I am going to work up to a certain place." He says, "If I strike nothing, I'll get out of here," and I talked with him a while and never said anything to him about locating water. I went on up the gulch and saw Jim Ax. "Say, what are you doing,—any good?" He says, [53] "No, I am not," and he says, "I am going to work here a few weeks longer before I am going to get out. I don't think there is anything in here," something like that, and that's all I know about it. Afterwards I knew they had litigation and were bought out.

Cross-examination by O. W. McCONNELL, Esq., for Complainant.

Question. The waters of Lump Gulch are tributary to Prickly Pear, are they not?

Answer. That's right.

Question. And you people, and the others living in the Prickly Pear Valley, had appropriated water from the Prickly Pear Creek and in consequence of that you had appropriated water from Lump Gulch?

Answer. Yes, that's right.

Question. You had plenty of water at that time, in '69, '70 and '71, did you not?

Answer. I think we did.

Question. If you desired to help the Park Ditch enterprise you did not consider that you were giving away any of your water rights?

Answer. I did; all that was in Lump Gulch.

Question. Did you personally receive any con-

(Deposition of D. A. G. Flowerree.)

sideration for that?

Answer. Well, I was one of the members.

Question. You were one of the Park Ditch Company?

Answer. The Park Ditch Company and I was a promoter. There was about five of us on the same way. We offered $500.00 apiece. Well, there was Tom Ray offered $500.00, Jesse Taylor offered $500.00, and I offered $500.00 to start.

Question. Start what?

Answer. This ditch, the Park Ditch Company, to permit them to bring the Park Ditch and bring the waters in, but there was us three, I know, and we had a talk, us three, about it. Now, we heard this Park Ditch was about to fall through and we had to stand in. They wouldn't take the $500.00. Some of them got warmed up. We went to work and surveyed and we got it started. Mr. Hale was a little warmed himself. We had a man here that had plenty of money, Mr. Woolfolk, a lawyer, [54] and he got warmed up. I went into Hale's Drug Store. I had paid $200.00, my first assessment. They made another call. This was for surveying purposes, preliminary. Hale said, "If you will pay up the assessment, I'll take it off your hands." $350.00, it was. I paid it. I quit it for $350.00 loser.

Question. Now, when was that, Mr. Flowerree?

Answer. That was within a month after that time.

Question. Was that before or after the agreement was signed?

Answer. Afterwards.

(Deposition of D. A. G. Flowerree.)

Question. At the time the agreement was made and you signed the agreement, were you connected with the Park Ditch Company?

Answer. Yes, sir.

Question. As a matter of act, Mr. Flowerree, there was no consideration at all passed to you for giving this up, but, on the contrary, you paid out money yourself?

Answer. Yes. I was producing crops out on the valley. There was three years, and the first year I had one thousand bushels of potatoes, and another year fifteen hundred bushels, that I had to give away, because I had no market for them.

Question. Potatoes were a drug on the market, then?

Answer. We had no people here, and people were leaving the country and it was a ground hog case. We wanted to increase the population and we thought the ditch would give employment to miners and make a market for our crops.

Question. It would enable you to sell potatoes?

Answer. Everything. There's was hundreds of miners working round in two years and up in the Park Ditch.

Question. Well, Mr. Flowerree, did you discontinue in any regard the use of the water for the subsequent years after that, or did you continue to use water from Prickly Pear just as you had done before?

Answer. Yes, sir.

Question. The signing of this agreement, then,

(Deposition of D. A. G. Flowerree.)

did not in any way at all cause you to give up the use of the water?

Answer. No, sir. [55]

Question. Well, is it nor a fact, Mr. Flowerree, that you represented to the ranchers in the valley, who signed this agreement, that it would be a benefit to the ranchers and to the users of water for the reason that the Park Ditch Company would store the waters in reservoir and would thereby furnish more water to the ranchers?

Answer. No.

Question. Is it nor a fact that it was represented to the ranchers that the signing of this instrument would not in any way interfere with the use of water upon ranches as they had heretofore used it?

Answer. Except Lump Gulch, yes, sir.

Question. Well, what about the water they were using out of Prickly Pear Creek?

Answer. Yes, and we signed our rights to the waters of Lump Gulch that flowed from Lump Gulch with the distinct understanding that we gave it to the Park Ditch to build this ditch.

Question. You did not feel that you were actually parting with anything in signing that paper, did you, you had plenty of water?

Answer. We did.

Question. I suppose the ranchers that had claims appropriated water individually?

Answer. Yes, to the best of my knowledge.

Question. Well, you did not expect that in doing so, it would in any way interfere with the use of water

(Deposition of D. A. G. Flowerree.)
from Prickly Pear Creek?

Answer. We signed the rights of Lump Gulch.

Question. Did you expect it would interfere with Prickly Pear Creek?

Answer. It did not.

Question. Where was this mining of the Park Ditch Company to be conducted?

Answer. Well, it was to take the water anywhere they wanted to.

Question. Did you desire to get the Park Ditch to operate certain mines?

Answer. We were working these mines in Dry Gulch, Holmes [56] Gulch and a number of other gulches.

Question. There is Clark's Gulch and Holmes' Gulch?

Answer. Yes, sir.

Question. Well, is it not a fact, Mr. Flowerree, that after the water had been used by the Park Ditch Company for mining purposes it would flow down on Holmes Gulch and come on down the Prickly Pear Creek?

Answer. Yes, sir. That's right.

Question. You could not quote to us the wording of that written instrument, could you?

Answer. No. I think it is, that is, I'll give what I can, that we give the Park Ditch Company the right to use the waters of Lump Gulch, and I don't know for certain whether it specified the place to take it out or not.

(Deposition of D. A. G. Flowerree.)

Question. Did it state for what they were to use it?

Answer. Yes, for mining purposes, and other grounds; placer mines, it was.

Question. Your object in that was to put men to work on the mines, but that it would not diminish the flow of your water and the water your company used would come down Holmes Gulch and come back into the Prickly Pear Creek?

Answer. There was nothing of that kind specified.

Question. But was not that your understanding?

Answer. There was an understanding that we gave them the water for mining purposes.

Question. After they were through with it you expected them to allow it to flow back into the stream?

Answer. We wanted to use it for our crops.

Question. Well, it is a fact, Mr. Flowerree, that after you signed this agreement for the waters for Park Ditch the waters continued to flow down and come into the Prickly Pear Creek?

Answer. Well, now, to tell you the truth, that I could not swear to at all. Of course I've never been on Lump Gulch since that time. I have probably been there hunting, but I never paid no attention to it as to where the waters did come. The waters were used in a number [57] of gulches round here. How far they were taken I don't know.

Question. The only person that you can testify as to your personal knowledge that signed this paper

(Deposition of D. A. G. Flowerree.)

was the one you saw sign it, Mr. James Fergus?

Answer. That's all, and Mr. Woods. We left it with Doc. Steele and Jim Caldwell.

D. A. G. FLOWERREE.

Subscribed and sworn to before me this thirteenth day of October, 1903.

[Notarial Seal] J. MILLER SMITH,

Notary Public in and for Lewis and Clarke County, State of Montana.

State of Montana,
County of Lewis and Clarke,—ss.

I, J. Miller Smith, a Notary Public in and for said Lewis and Clarke County, do hereby certify that the witnesses Patrick Woods and D. A. G. Flowerree, in the foregoing depositions named, were by me severally, duly sworn to testify the truth, the whole truth and nothing but the truth in said cause; that said depositions were taken at the time and place mentioned in the annexed stipulation, to wit, at the law office of Massena Bullard, Room 8, Gold Block, Helena, Montana, commencing at ten o'clock A. M. on Tuesday, the eighth day of September, 1903, and that the taking thereof was continued from time to time and by the consent and agreement of the parties appearing until the thirteenth day of October, 1903, on which day the taking of said depositions was concluded; that said depositions were reduced to writing by me and when completed the deposition of each witness was by me carefully read to said witness and by him corrected, and was by him subscribed in my presence.

In witnrss whereof, I have hereunto subscribed my name and affixed my seal of office, this thirteenth day of October, 1903.

[Notarial Seal] J. MILLER SMITH,
Notary Public in and for Lewis and Clarke County, State of Montana. [58]

[Endorsed]: No. 668. Ames Realty Company, a Corporation, Complainant, vs. Big Indian Mining Company, a Corporation et al., Defendants. Deposition. Notary's Fees, $7.00. J. Miller Smith, Notary Public. Filed Oct. 16, 1903. Geo. W. Sproule, Clerk. Massena Bullard, Attorney for R. S. Hale, Defendant, Helena, Montana. [59]

That on the 31st day of December, 1908, the Deposition of W. L. Steele was duly filed herein, being in the words and figures following, to wit: [60]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation, R. S. HALE et al.,
Defendants.

Stipulation [Re Deposition of W. L. Steele].

It is hereby stipulated and agreed that the deposition of W. L. Steele, witness of the defendant, R. S. Hale, in the above-entitled action, may be taken at the law office of Massena Bullard, Room 8, Gold Block, Helena, Montana, before any notary public

in and for Lewis and Clark County, Montana, on Saturday, April 23, 1904, commencing at the hour of two o'clock P. M. of said day, and if not completed on that day may be continued from day to day and over Sunday until completed, and that when so taken the same may be read in evidence on the trial of said cause, it being expressly stipulated that notice of the taking of said deposition is hereby waived, and said deposition may be taken in all respects the same and with like effect as if due and regular notice had been given and served, reserving the right to all parties to object to any and all questions and answers at the time of the trial of said action, the same as if said parties were present in court and testifying.

Dated April 21, A. D. 1904.

McCONNELL & McCONNELL,
Attorneys for Complainant.

H. S. HEPNER,
Attorney for Defendant Zastrow et al.

C. A. SPAULDING,
Atty. for Deft. Robert Strobel.

H. G. & S. H. McINTIRE,
Attys. Big Indian Mng. Co.

NOLAN & LOEB,
Attys. for Reynold Prosser.

SHOBER & RASCH,
Solicitors for 16 Defendants.

A. P. HEYWOOD,
M. S. GUNN,
A. K. BARBOUR,
Atty. for Helena & Livingston S. & R. Co.

LEON A. LaCROIX,
For Hall, Parke and Clegg. **[61]**

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation, R. S. HALE et al.,
Defendants.

Deposition of W. L. Steele.

BE IT REMEMBERED: That, pursuant to the stipulation hereunto annexed, and on the twenty-third day of April, A. D. 1904, at two o'clock P. M. of said day, at the law office of Massena Bullard, Room 8, Gold Block, in the City of Helena, Lewis and Clark County, State of Montana, before me, Richard Lockey, Jr., a notary public in and for said County of Lewis and Clark, duly appointed and commissioned to administer oaths, etc., personally appeared W. L. STEELE, a witness produced on behalf of the defendant, R. S. Hale, in the above-entitled action, now pending in the said court, who being first by me duly sworn, was then and there examined and interrogated by Massena Bullard, Esq., of counsel for the defendant, R. S. Hale, and by Odell W. McConnell, Esq., of counsel for the said complainant, and A. K. Barbour, Esq., of counsel for the defendant, The Helena & Livingston Smelting & Reduction Company, and testified as follows:

Question. State your name, age, place of residence and occupation.

(Deposition of W. L. Steele.)

Answer. William L. Steele; seventy-one years old; Helena, Montana; occupation, physician.

Question. How long have you resided in what is now the State of Montana?

Answer. Since 1863.

Question. You may state whether you at any time resided in the Prickley Pear Va*lly*, in Lewis and Clark County, Montana, and if so when.

Answer. I resided there, let's see, '67, '68, '69, and probably [62] part of '70.

Question. Were you acquainted during those years with A. M. Woolfolk, John H. Ming, John Kinna, D. A. G. Flowerree, T. A. Ray and Patrick Woods?

Answer. I was.

Question. How long have you known those men?

Answer. I have known all of them since 1867.

Question. Were you acquainted with all the men I have named during the years 1869, 1870, 1871, and 1872.

Answer. Yes.

Question. State whether during the years I have named you were acquainted with what is known as Lump Gulch, in Jefferson County, Montana.

Answer. I have been on it as early as '65 and frequently thereafter.

Question. State whether during the years above named you were acquainted with what is known as the Park Ditch enterprise.

Answer. I think I was acquainted about '69, probably. I think it was about that time.

(Deposition of W. L. Steele.)

Question. Who was particularly connected with that enterprise?

Answer. I was connected with that enterprise. John Ming and John Kinna were also interested in it.

Question. State whether during the years I have named you were acquainted with any of the water rights of Prickley Pear Creek in Jefferson County.

Answer. I think I knew them all.

Question. Give the names of as many of them as you can now recall.

Answer. Well, there's Flowerree, Shelton Duff, one of the Fryatt's and Mr. Wilkinson. There was old man Newton right beside him. A little below was John Cave and then coming out from there we come to what we called the Scotty ranch. They went by the name of Scotty and the other was Bob Barnes. There was Jim Smith down in the valley and a little above him old man Gratten. Above him was old man Dean. There was Alexander Burns and above him Bill Reeves. Bill, I think, [63] claimed that he took his water from McClelan Gulch. The*m* coming on down there some man, I don't believe it was Shaw. He lived on a ranch right opposite where East Helena is. I think old Mrs. Duke owned it, but I am not sure. I think Warfield owned a ranch in there. There was Myron Brown, Harry Neafus, Thomas Thorpe, James Anthony, Patrick Woods, W. L. Millegan, Rexford, and I believe Mr. Bullard's father owned a ranch. That is about all of them. There may be one or two more.

(Deposition of W. L. Steele.)

Question. State whether at any time during the years I have named you recall any transactions relative to the waters of Lump Gulch and the Park Ditch.

Answer. Yes, sir, with the Park Ditch.

Question by Mr. McCONNELL, Counsel for Complainant.—Were the transactions about which Mr. Bullard was asking you relative to the Lump Gulch and the Park Ditch in writing?

Answer. There was.

Counsel for the complainant objects to any testimony in reference to this matter by this witness, for the reason that the written instrument itself is the best evidence of its contents, and any testimony given by this witness would be hearsay, irrelevant, incompetent and immaterial.

Counsel for the defendant, The Helena & Livingston Smelting & Reduction Company, interposes the same objection as above interposed in behalf of the complainant in this action.

Question. Do you know where the written document to which you have referred above is?

Answer. Jim Caldwell and myself gave it to Col. A. M. Woolfolk. That is the last I saw of it or heard of it.

Question. Now, you may answer the question as to whether during the years I have named you recall any transactions relative to the waters of Lump Gulch and the Park Ditch between the owners of the Park Ditch and the farmers in the valley. [64]

Counsel for the complainant and counsel for the

(Deposition of W. L. Steele.)

defendant, the Helena & Livingston Smelting & Reduction Company, interpose the same objection as above.

Answer. Yes.

Question. State in your own language and to the best of your memory what this transaction was and how it arose.

It is stipulated by the respective parties that all testimony in this deposition relative to the written document mentioned by the witness is objected to as incompetent, and defendant, Helena & Livingston Smelting & Reduction Company, as incompetent, for the reason that the written document itself is the best evidence, and also on the ground that it is immaterial, and upon the further ground that the complainant and the other parties to this action had no notice thereof, and this objection shall apply without the necessity of repeating it in the further taking of the testimony.

Question. You may now state in your own language and to the best of your memory what that transaction was and how it arose.

Answer. In the first place, all the mines could get water to be worked. There was no quartz being worked in the country and everything was awfully dull. We farmers couldn't sell a load of vegetables. We had to throw*n* our vegetables away and hay was pretty much the same way. Believing that there was a great deal of ground here that would pay to work if we had water on it, we gladly consented to relinquish all rights we might have to the waters of

(Deposition of W. L. Steele.)

Lump Gulch in favor of the Park Ditch Company. Well, Mr. Flowerree and Patrick Woods came to me with a paper whereby we agreed to relinquish our rights, and they had been around a part of the valley and they requested myself and Jim Caldwell to go the next day and see all the other farmers. We went around and say every man that had water. They all signed that paper relinquishing their rights with the exception of old man Dean. He said he would go up and see Woolfolk himself, personally, and on the next day he would sign it, and every man was keen to signing it that wanted to encourage the building of that ditch. They all felt that something should be done to revive up that country. [65]

Question. Your memory is that all the owners of water rights in Prickly Pear Creek united in signing that document?

Answer. They all signed except Mr. Dean. He said he wouldn't refuse but would sign it the following day.

Question. State as near as you can remember the contents of that paper that was signed by those owners of water rights in Prickly Pear Creek.

Answer. I cannot recall anything more than that we relinquished our right to the use of any right we had obtained in the waters of Lump Gulch. We relinquished it to the Park Ditch Company. I don't mean that I saw all of them. Patrick Woods and Dan Flowerree had already seen a portion of the farmers and had their names signed to it, but it is true that all the farmers signed the agreement either

(Deposition of W. L. Steele.)
for Patrick Woods, Dan Flowerree or for Mr. Caldwell and myself, except Dean.

Cross-examination by ODELL W. McCONNELL, Esq., for Complainant.

Question. Doctor, you say this consent was in writing?

Answer. Yes, sir, it was.

Question. It was a written instrument?

Answer. Yes.

Question. And you cannot now give us the substance of this written instrument?

Answer. The substance is what I told you, that we relinquished our rights to the Park Ditch Company.

Question. It was a relinquishment of your rights to the Park Ditch Company?

Answer. It was.

Question. Is it not a fact, Doctor, that it was represented to yourself and to the other ranchers that the Park Ditch Company would store the water in a reservoir or otherwise and that by so storing the water, they would really have more water for the ranches than they had had? [66]

Answer. I think not. Nothing was said about storing the water in a reservoir.

Question. Is it not a fact that it represented that the waters of Lump Gulch would be stored in a reservoir for the purpose of use?

Answer. That was the understanding. It was for that purpose.

Question. And that it would not interfere with

(Deposition of W. L. Steele.)

the use of the water by the ranchers by signing this paper?

Answer. Of course, we all understood there would be less water on the ground.

Question. Did you understand or did the ranchers understand that the signing of this paper would not interferee with the water rights of the ranchers in the valley?

Answer. We gave up our water rights that we had to Lump Gulch and Travis Creek.

Question. Was any consideration paid to you for this?

Answer. No, sir.

Question. Do you, as one of the parties who went around to some of the ranchers, know of any consideration being made to them to sign this paper?

Answer. No, sir. We knew it would be a benefit to the country for all the owners of these water rights to relinquish them.

Question. Were they not to be used for mining purposes alone by the Park Ditch Company?

Answer. We gave it up to the Park Ditch Company to build a ditch. There was no consent and nothing said about what should be done with that water, only they expected to build a ditch.

Question. Well, that was the understanding and reason that you gave up your right, for having the country developed and to be used for mining purposes?

Answer. Yes, sir, of course. For mining or milling purposes or any other purpose.

(Deposition of W. L. Steele.)

Question. Doctor, you do not want us to understand that you [67] donated to the Park Ditch Company your water right, or any portion of your water right for the purpose of agricultural, or for selling water to other individuals, or anything of that sort, do you?

Answer. We gave up the water right absolutely for that reservoir. The time that it would take them to mine out that country would benefit us more than the water could have ever benefited us.

Question. There was no consideration other than the benefits that would result to you from the mining?

Answer. We gave it up for any purpose that would benefit the country.

Question. Solely for mining purposes?

Answer. No, we gave it up for any good purpose.

Question. You did not expect that it would interfere with your right to the waters of Prickly Pear Creek, did you?

Answer. No. We were willing that it should be used to develop the country.

Question. And there was plenty of water up to that time for you without this water?

Answer. Let me see. There were a few streams of water occasionally. Some of the little streams would not run into Prickly Pear Creek and in fact I saw the time when we croosed Prickly Pear dry shod right there at Millegan's right down here in Prickly Pear valley.

Question. There was plenty of water to irrigate your crops?

(Deposition of W. L. Steele.)

Answer. Yes.

Question. You did not expect to in any way interfere with your rights and it did not interfere with your rights, did it?

Answer. No. We had water after the signing of this agreement. The Park Ditch Company at that time made use of the water so far as we were concerned.

Question. You had plenty of water without the Lump Gulch water [68] with which to irrigate your crops and the Park Ditch Company may have appropriated the water without this written consent, might they not?

Answer. I expect they could.

Question. Do you know where the water from Lump Gulch empties into the Prickly Pear?

Answer. I think so. I think I know. It is not far from McCauley's place. I always supposed that was where it emptied into the Prickly Pear.

Question. Is it not a fact that after this written instrument was signed the waters of Lump Gulch continued to flow on down into the Prickly Pear Creek?

Answer. I don't know. I suppose it did. I know there was water running below where they diverted it from Lump Gulch.

Question. Did you record this written instrument that you had the parties sign?

Answer. I gave it to Col. Woolfolk and what he done with it I don't know.

Question. Was this written instrument simply a

(Deposition of W. L. Steele.)

consent to let the Park Ditch Company use the waters of Lump Gulch for mining purposes?

Answer. I can't tell what it was.

Question. You cannot now remember the contents of that instrument?

Answer. No. What I considered it was that I donated to that company all my right, title and interest to those waters.

Question. Did any owners accompany you and Mr. Caldwell on your trip?

Answer. James Caldwell did.

Question. Was this instrument sworn to and acknowledged before a notary public at all?

Answer. I don't think it was. I don't know. We requested Woolfolk to take it.

Question. Did you acknowledge it? [69]

Answer. I don't know; I think not.

Question. As you now remember the instrument, it was not entitled to be recorded, and it was not acknowledged, witnessed or certified as required by the law?

Answer. I didn't have it recorded. I don't know.

Question. Did you after you signed this written instrument discontinue the use of the waters of Prickly Pear Creek for the irrigation of your place, or did you continue to irrigate your place from Prickly Pear as you had done previously to signing this instrument?

Answer. Well, personally, I did for one or two years.

Question. In other words, the signing of this in-

(Deposition of W. L. Steele.)

strument did not in any way interfere with the use by you of the waters of Prickly Pear Creek?

Answer. No.

Question. Where were the mines of the Park Ditch Company that this water was to be used upon?

Answer. All around the Park there. In Dry Gulch and Holmes Gulch and they run on down to the head of Nelson Gulch, and then there was Nelson Gulch and between Nelson Gulch, Grizzly Gulch and Oro Fino and as far as Dry Gulch.

Question. The mines that the Park Ditch Company were supposed to work with this water were in Dry Gulch, Holmes Gulch and Clark's Gulch?

Answer. Anything that the water would cover.

Question. Is it not true, Doctor, that after the water was used on these mines that it still flowed down these gulches and came on down the Prickly Pear Creek?

Answer. No, not much of it.

Question. In other words, those gulches were tributary to Prickly Pear, were they not?

Answer. Yes, sir. [70]

Redirect Examination by MASSENA BULLARD, Attorney for Defendant, R. S. Hale.

Question. In the early season there was an abundance of water in Prickly Pear Creek for the use of the appropriators?

Answer. Yes, sir, as much as was needed.

Question. In the agreement that you and other farmers made relinquishing your rights in Prickly Pear Creek in favor of the Park Ditch Company as

(Deposition of W. L. Steele.)

to the waters of Lump Gulch what, if any, restrictions were placed upon the Park Ditch Company as to the use they should make of the water.

COUNSEL FOR COMPLAINANT and COUNSEL FOR DEFENDANT, The Helena & Livingston Smelting & Reduction Company.—To that we object, as the written instrument itself is the best evidence thereof, and further, that the witness has testified already that he cannot remember the contents of the instrument.

Answer. There was no restrictions.

Redirect Examination by ODELL W. McCONNELL, Attorney for Comp*alia*nt.

Question. But it is a fact that the relinquishment was given for the purpose of enabling the Park Ditch Company to work certain mines and furnish a market for the farmers of Prickly Pear Valley?

Answer. No, it was relinquished for the purpose of enabling them to build a ditch. They were going to build the ditch because they knew it would help the country and encourage mining. I offered my ranch for a lot up in town. It was no earthly use. The country had to be built up.

WM. L. STEELE.

Subscribed and sworn to before me this twenty-third day of April, 1904.

[Notarial Seal] RICHARD LOCKEY, Jr.,
Notary Public in and for Lewis and Clark County, State of Montana. [71]

[Endorsed]: Ames Realty Company, a Corporation, Complainant, vs. Big Indian Mining Company,

a Corporation, R. S. Hale et al., Defendants. Deposition of William L. Steele, Witness for Defendant R. S. Hale. Notary's Fees: 30 Folios at .20, 6.00; Certificate, .50—$6.50. Opened by Order of Court and Filed Dec. 31st, 1908. Geo. W. Sproule, Clerk, By C. R. Garlow, Deputy. Massena Bullard, Attorney for Defendant, R. S. Hale, Helena, Montana. [72]

That on July 1, 1908, the testimony taken in this cause was duly filed herein, that portion thereof specified in the praecipe for transcript being as follows, to wit: [73]

ROBT. S. HALE RIGHT.

Helena, Montana, June 17, 1907, 10 A. M.

Hearing resumed pursuant to call of attorney for Robt. S. Hale, one of the defendants in this case.

[Testimony of Robert S. Hale, a Defendant, in His Own Behalf.]

ROBERT S. HALE, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. MASSENA BULLARD.)

Q. Please state you name in full.

A. Robert S. Hale.

Q. Where do you reside? A. Helena, Montana.

Q. How long have you resided here?

A. Since 1865, May, 1865.

Q. Are you the Robert S. Hale, who is named as one of the defendants in this action? A. I am.

Q. You may state, Mr. Hale, whether you are a citizen of the United States. A. I am.

(Testimony of Robert S. Hale.)

Q. Are you acquainted with the Park Ditch, a ditch leading from Park Lake in Lump Gulch, Jefferson County, State of Montana, to the Park Mines near Unionville? A. I am.

Q. In Lewis and Clark County, and other mining lands in Lewis and Clark County? A. I am.

Q. How long have you known that ditch?

A. I have known it,—that is, when we first located it?

Q. Yes, sir.

A. The fall of '69, September '69. [74]

Q. Have you been intimately acquainted with the property ever since that time? A. I have.

Q. Do you know where Park Ditch gets its supply of water? A. Yes, sir.

Q. From where? A. Lump Gulch.

Q. In what county? A. Jefferson county.

Q. At what point is that water diverted from Lump Gulch?

A. At a point about half a mile below the lake.

Q. Below Park Lake?

A. Below Park Lake, yes, sir.

Q. By what means is the diversion made?

A. By a ditch.

Q. When was that ditch originally constructed?

A. It was constructed in '70.

Q. Describe the ditch from the point of intersection with the waters of Lump Gulch throughout its course.

A. It is taken on a grade from Lump Gulch around the foot of the mountains crossing the Grizzley

(Testimony of Robert S. Hale.)
divide into Grizzley Gulch.

Q. What is the size of the ditch at the point where it takes the waters from Lump Gulch?

A. It is thirty by forty inches.

Q. Thirty inches wide, do you mean?

A. Thirty inches at the bottom and forty inches on top.

Q. And how deep?

A. About twenty-four inches deep.

Q. What grade? A. Four-tenths of an inch.

Q. Four-tenths of an inch to the rod?

A. Yes, sir. [75]

Q. Are you acquainted with the measurement of water for mining purposes?

A. To a certain extent; I have had some experience.

Q. How long have you been acquainted with water rights and the use of water for mining purposes?

A. Since 1871.

Q. In what business have you been engaged during those years to the present time?

A. I have been engaged in various businesses.

Q. Have you been engaged in the business of mining during this period? A. Yes, sir.

Q. From what time? A. Since '76.

Q. Continuously? A. Continuously, yes, sir.

Q. What amount of water will the Park Ditch carry frum Lump Gulch throughout its course?

A. It should carry 500 inches.

Q. Will it carry that much?

A. Not at present; it is badly filled up with sand and stuff.

(Testimony of Robert S. Hale.)

Q. How much will it carry now?

A. About 400 inches of water; that is a general average; there are places in that ditch that will carry 1,000 inches.

Q. But it is safe to say it will carry 400 inches of water? A. Yes, sir.

Q. What is the length of that ditch?

A. Thirteen miles.

Q. From Lump Gulch to what point?

A. To Grizzly divide.

Q. Does it end in Grizzl*e*y divide, or does it come on down? [76]

A. It returns to Grizzl*e*y Gulch, follows the gulch on down.

Q. Does the bed of the gulch form a continuation of the ditch?

A. It is the natural channel of the gulch.

Q. The waters of the ditch are then taken into—

A. Into the head of the natural channel of Grizzl*e*y Gulch.

Q. What I am desirous of obtaining is the length of the water right.

A. It runs down into Grizzly Gulch, through the city of Helena.

Q. What is the length of it from the point of diversion to here in Helena?

A. Must be twenty miles, or over.

Q. Were you acquainted with the Park Ditch and its construction at the time of its inception?

A. Yes, sir.

Q. Do you know anything about the general cost

(Testimony of Robert S. Hale.)
of the ditch? A. Yes, sir.

Q. What was the cost of that ditch?

A. The main ditch to Grizzly divide between $30,000.00 and $40,000.00 dollars. There are tributaries running to Dry Gulch and to Lump Gulch, but those are now abandoned. The ditch proper is from Lump Gulch to Grizzly divide.

Q. You may state whether or not in connection with that ditch there is any means of reservoiring water during the times of high water, so that it may be used in times of low water.

A. It is reservoired in Park Lake.

Q. Where is Park Lake?

A. It is situated half a mile above where the water is diverted from Lump Gulch, and into that lake we have a feeder from [77] Lump Gulch, about half a mile above where we divert the water, in the mai*l* line, that feeds Park Lake, and we run the water from Park Lake down into the main gulch, where I have a distributing reservoir 200 or 300 feet above where I take the water out of the main ditch.

Q. The Park Lake, then, is a part of the Par*t* Ditch construction? A. Yes, sir.

Q. You then, as a matter of fact, have two ditches out of Lump Gulch?

A. One is a feeder for reservoir purposes, and the other is the main line of the ditch.

Q. And from the lake there is a connection by ditch with the main line?

A. Yes, sir, a little gulch leading down to the main ditch from the lake.

(Testimony of Robert S. Hale.)

Q. During what season do you use the feeder into the lake, what part of the season?

A. As long as there is any water running.

Q. You may state, Mr. Hale, if you know, the proportion of the waters of Lump Gulch that are taken out of it by these ditches.

A. It is all, pretty much.

Q. The entire water supply of Lump Gulch?

A. Yes, sir, of the waters above where the ditch taps it, it is all taken out.

Q. Is that true in seasons of very high water?

A. There may be for certain times a little overflow in the lower reservoir in the early season.

Q. For what purposes are the waters appropriated by this ditch used? A. Mining purposes. [78]

Q. How long has it been used for such purposes?

A. Since 1871.

Q. Do you speak of this of your own knowledge, or hearsay?

A. My own knowledge; I was one of the original locators, one of the parties who built the Park Ditch.

Q. What interest have you in the Park Ditch, yo*u*self? A. Now, at this time?

Q. Yes, sir.

A. I own it.

Q. The entire Park Ditch and all of its tributaries? A. Yes, sir.

Q. How long have you owned the Park Ditch?

A. Since 1874; '74 I think it was sold.

Q. Since that time you have been the individual owner of the whole thing?

(Testimony of Robert S. Hale.)

A. Yes, sir, individually owned the whole plant.

Q. State what years since you have owned it you have operated the ditch for mining purposes.

A. I have operated it since I owned it, since '76— '75.

Q. Every year? A. Every year.

Q. During every mining season?

A. Continuously.

Q. And you are operating it now? A. Yes, sir.

Q. You may state whether the water supply of Lump Gulch, of which you have taken all, as you say, is more than sufficient for your mining operations.

A. They are not sufficient as I would like to have them.

Q. Is it true that you have had, ever since your ownership [79] of that property, and now, need all of the waters appropriated by the Park Ditch for your mining purposes?

A. Yes, sir; and I would like to have two months more.

Q. Two months more,—and a larger supply?

A. And a larger supply, yes, sir.

Q. I will ask you to state, Mr. Hale, whether at any time since this ditch was located any person other than the Park Ditch Company and yourself has had any use of the waters of Lump Gulch below the point of your diversion? A. No, sir.

Q. Do you mean that you have appropriated all the water for your mining purposes during the season?

(Testimony of Robert S. Hale.)

A. All the waters above the point where we take the ditch out?

Q. I will ask you whether or not you or the Park Ditch Co. have ever been interrupted or interfered with in the use of those waters?

A. None whatever.

Q. You may state whether prior to the appropriation of the water and the operations of that ditch, in anticipation of it, any arrangement was made with other parties claiming waters of Lump Gulch.

A. There were.

Q. What arrangement was made?

A. The arrangement was, there was a petition circulated to get the right to the use of all that water above this point of diversion from every man on the line of that ditch, from this point down to the Missouri river.

Q. Do you mean on the line of the ditch or Lump Gulch?

A. On Lump Gulch and Prickly Pear Creek. [80]

Q. Did that embrace every one that had any claim to those waters?

A. Yes, sir; those whom we couldn't get to consent, we bought.

Q. So you acquired all rights?

A. All prior rights to that water.

Q. Was that instrument in writing?

A. Yes, sir.

Q. Have you got that instrument now?

A. No, sir.

Q. Have you made any attempt to find it?

(Testimony of Robert S. Hale.)

A. I have searched the records; I supposed it was put upon record.

Q. You are unable to find the document itself?

A. Yes, sir.

Q. But you saw it and know it was signed by the parties?

A. I saw it before it was sent out for circulation, but as to whether I saw it after, I don't know. Col. Woolfolk was general manager and he was attending to it.

Q. You may state whether since that time all prior owners have acquiesced in the use of the waters by the Park Ditch Company; there has been no objections? A. Not to me.

Q. You have been in charge all of these years?

A. Yes, sir, except before I purchased it, when Col. Wolfolk had it. I was a member of the Park Ditch Company, vice-president, and knew all about the proceedings.

Q. How many acres of mining ground do you own covered by this ditch?

A. Between five and six hundred acres. [81]

Q. In what counties?

A. In Lewis and Clark and Jefferson counties.

Q. You may state whether your possession and use, and the possession and use of the Park Ditch Company of these waters has been open and notorious or otherwise. A. Yes, sir.

Q. And the waters have been under claim of absolute title? A. Yes, sir.

No cross-examination.

Witness excused. [82]

[Testimony of John Shober, for Defendants.]

JOHN SHOBER, a witness called on behalf of Robt. S. Hale right, being duly sworn, testified as follows:

Direct Exemination.

(By Mr. BULLARD.)

Q. Your name? A. John H. Shober.

Q. Where do you reside, Mr. Shober?

A. Helena, Montana.

Q. And what is your age?

A. Seventy-five past.

Q. I will ask you to state whether you are acquainted with the property known as the Park Ditch running from Lump Gulch, in Jefferson county, to down over the divide and down Grizzley Gulch to the city of Helena, in Lewis and Clark County?

A. I am.

Q. How long have you known that property?

A. I have known it since the early seventies.

Q. Are you acquainted with Robt. S. Hale?

A. I am.

Q. Do you know what connection he has with that property?

A. I have understood that he has been the owner and controller since '76.

Q. That is the same property about which Mr. Hale has just been testifying?

A. The same property.

Q. I will ask you if you are acquainted with Lump Gulch? A. I am.

Q. Are you acquainted with the point where Park

(Testimony of John Shober.)

Ditch taps Lump Gulch? A. Yes, sir. [83]

Q. And Park Lake? A. Yes, sir.

Q. You may state whether, of your own knowledge, Park Ditch diverts the waters of Lump Gulch, and all of them, during ordinary seasons?

A. Ordinary seasons it diverts all the water of Lump Gulch flowing above where the ditch taps it.

Q. All above that point? A. Yes, sir.

Q. And state whether or not that has been true since your early knowledge of and acquaintance with the property.

A. That has been true in the ordinary stage of the water.

Q. You may state, Mr. Shober, whether you were at any time acquainted with or had knowledge of an arrangement made between parties claiming water rights in Lump Gulch in the early seventies and the Park Ditch Company?

A. In '70 or '71, I knew of some sort of an arrangement. It was a kind of stipulation that the appropriators of claims or claimants to water in Prickly Pear and Lump Gulch; that embraced about all the parties claiming water rights there, stating they would make no claim against the diversion of any of the waters above the point where this ditch tapped the creek; that is about the substance of it.

Q. Did you see that agreement?

A. I saw it at the time; I saw it in the hands of Colonel Wolfolk.

Q. Are you aware it was signed at that time?

A. It was signed by a number of parties; I cannot

(Testimony of John Shober.)

remember who they were. [84]

Q. You remember the effect of it was to relinquish—

A. To any waters of Lump Gulch above the point where the Park Ditch taps the waters of Lump Gulch. So far as the waters in this lake, there is not over twenty-five inches in a very low time, and the point of diversion is about 16 miles above the mouth of Lump Gulch.

Q. I will ask you if you knew B. B. Belcher?

A. Yes, sir.

Q. And what, if anything, concerning his claim to water rights?

A. He had a mining claim and water right in Lump Gulch, and disposed of it to parties interested in the Park Ditch.

Q. R. L. McMasters?

A. I am not so sure, but I am satisfied I know Al Axe.

Q. And he disposed of water rights to the company? A. Yes, sir.

No cross-examination.

Witness excused. [85]

[Testimony of Robert S. Hale, a Defendant, in His Own Behalf.]

ROBT. S. HALE testified as follows:

(By Mr. BULLARD.)

Q. You may state what, if any, effect on the waters of Lump Gulch below the point of diversion is had by reason of reservoiring the waters in the high season in Park Lake?

A. It has the effect of keeping the waters up be-

(Testimony of Robert S. Hale.)
low that point; there is a large seepage from the lake which flows back into Lump Gulch and helps to keep the water up during the months of July, August and September, when the people need it.

Q. What have you to say,—by reason of the Park Lake and the waters reservoired in it, as to whether below where you take all the waters of Lump Gulch, the waters through the farming season, are less or greater than they would be if Park Lake was not there?

A. It is greater, a great deal greater. It is quite a benefit to have that seepage flowing through during the dry months.

Witness excused.

Whereupon the hearing was adjourned to 2 o'clock P. M. of Tuesday, June 18, 1907. [86]

[Testimony of Edward W. Payne, for Complainant (in Rebuttal).]

EDWARD W. PAYNE, a witness in rebuttal, by complainant.

Part of Direct Examination.

Q. Do you remember a man by the name of A. M. Wolfolk? A. I do.

Q. You may state whether or not he constructed a ditch that tapped some of the tributaries of Prickly Pear Creek? A. Yes, sir.

Q. What were you doing at that time?

A. I was farming down in the Prickly Pear Valley.

Q. Do*u* you know whether or not there was circulated among the ranchers, or any attempt made by

(Testimony of Edward W. Payne.)

Wolfolk, to have the*n* sign an agreement letting him *taking* the waters of some of the tributaries of Prickly Pear Creek?

A. There was a proposition of that kind made, but the ranchers, as I understand, didn't care to do it.

Q. Did you sign such a*s* agreement?

A. I did not.

Q. Do you know of any ranchers in the Prickly Pear Valley who did sign such an agreement?

A. No, sir, not one.

Q. Do you remember about when it was he circulated this petition?

A. If my recollection serves me, I should say this happened in about 1867 or '68.

(P. 1663.)

Q. It might have been as late as 1870?

A. It might have been as late as 1870. [87]

[Testimony of W. L. Milligan, for Defendants (in Rebuttal).]

W. L. MILLIGAN, a witness in rebuttal of defendants' rights.

Part of Direct Examination.

Q. Did you know A. M. Wolfolk? A. Yes, sir.

Q. When was it that he began the construction of the ditch that tapped some of the tributaries of Prickly Pear Creek?

A. I don't believe I could tell you the date.

Q. Was it the same year he used lumber for building flumes? A. Yes, sir.

(Page 1668.)

A. N. Wolfolk circulated an*d* agreement among

(Testimony of W. L. Milligan.)

the ranchers in the Prickly Pear Valley in Lewis and Clark County in reference to allowing him to take the waters from the streams that were tributaries to the Prickly Pear conveying them into other gulches so that the water would not flow down into the Prickly Pear?

A. Yes, he circulated a petition down there.

Q. You may state whether or not, as near as you can, what the contents of that petition was, the agreement.

A. The agreement was to bring the water down Holmes Gulch above all other ditches above East Helena, coming down there by the Child's ranch. He said he owned Holmes Gulch and wanted to bring the water in for that purpose; he said he was going to build up a res*ev*oir up there and when there was plenty of water he would use it and we could use it after he used it.

Q. Where was the water to be used?

A. On Holmes Gulch.

Q. And for what purpose? A. Mining.

Q. And would that have lessened or diminished the supply of the ranchers in Lewis and Clark County? A. No, sir, it would have helped us.

Q. But did you ascertain that that wasn't where he was going to take the water? [88]

A. No, by himself; I always understood that he was going to take it down there.

Q. Did you sign the petition? A. No, sir.

Q. Do you know of any of the ranchers who did?

A. No, sir.

Page 1669.

(Testimony of W. L. Milligan.)

Q. Do you know of some who refused?

A. I do not; it never was brought up until most of them had gone away or died. He came to us separate. He would come to my house and then go down the creek.

Q. When did he come to your house with the petition or agreement?

A. I don't think there was any signers when he came to my house. I lived right on the road. [89]

[Testimony of William Warren (in Rebuttal).]

WM. WARREN, a witness in rebuttal.

Part of Direct Examination.

Q. Did you know A. M. Wolfolk? A. Yes, sir.

Q. Did you ever sign an agreement that he circulated through the valley, among the ranchers in Prickly Pear Valley, allowing him to take the waters of some of the tributaries of Prickly Pear Creek and reservoir them? A. No, sir.

Q. Do you know whether the man that you bought your ranch from signed such an agreement?

A. I never heard of anything like that.

Q. Did you ever have notice of any such agreement as this before this suit was brought and testimony was introduced by Mr. Hale? A. No, sir.

Q. Did you know of any recorded agreement of such kind? A. No, sir.

Q. Prior to the bringing of this suit in 1903, you may state whether or not there was a shortage of water by the use of the same by defendants in Jefferson county? A. Yes, sir.

Q. What year was it there was a particular short-

(Testimony of William Warren.)

age of water? A. I think in 1896.

Page 1672.

Q. How about the subsequent years up until 1903?

A. It has been short off and on ever since then.

Cross-examination.

(By Mr. THOMPSON.)

Q. Had there been any such an agreement as that which Mr. [90] Wolfolk may have had with reference to the reservoiring of these waters, would you have been likely to have heard of it?

A. I never heard of it.

Q. Would you have been likely to?

A. It seems like it; I have been in the valley a long time.

That's all.

Witness excused. [91]

[Testimony of Christmas G. Evans (in Rebuttal).]

Whereupon Mr. CHRISTMAS G. EVANS, a witness called and sworn in rebuttal, testified as follows:

Direct Examination.

(By Mr. McCONNELL.)

Q. State your name, residence and occupation.

A. Christmas G. Evans; Helena, merchandising.

Q. How long have you been a resident of Montana?

A. Well, I would have to stop and figure it out; I came here in 1864.

Q. In 1864? A. Yes, sir.

Q. That would be 44 years? A. Yes, sir.

(Testimony of Christmas G. Evans.)

Q. What business did you follow when you first came to Montana?

A. Well, I first engaged in mining.

Q. What, if any, business were you engaged in in 1870? A. Lumber business.

Q. Sawmill? A. Yes, sir.

Q. Where did you have a sawmill in 1870?

A. I moved over on to Lump Gulch in September, 1870?

Q. Did you know A. M. Wolfolk? A. Yes, sir.

Q. Do you know of his building a ditch that tapped some of the tributaries of Prickly Pear Creek?

A. Yes, sir.

Q. State what, if anything, you did with reference to furnishing lumber for flumes for that ditch. [92]

A. We furnished him some lumber in the fall of 1870 and the winter of 1871, and continued for a couple of years to furnish him lumber.

Q. Would you say that ditch was not completed until 1873?

A. Part of it was completed in 1872, I don't know but what the whole of it.

Q. In 1872? A. Yes, sir.

Q. When did he begin the construction of that ditch?

A. In the fall of 1870; I think some time about October.

Q. October, 1870? A. Yes.

Q. For what purpose did Mr. Wolfolk use the water that he took from the tributaries of Prickly Pear Creek? A. Well, for mining.

(Testimony of Christmas G. Evans.)

Q. And where did he do the mining?

A. Well, he done some mining on Holmes Gulch.

Q. And what became of the water after it was used by Wolfolk for mining in Holmes Gulch—where did it flow?

A. It went down into the Prickly Pear.

Q. Does Holmes Gulch come into Prickly Pear above East Helena? A. Yes, sir.

Q. For how many years did Wolfolk use his ditch in mining in Holmes Gulch, so that the water flowed back down into the Prickly Pear?

A. Well, he was mining there for several years, I don't know exactly how long; I don't remember.

Q. Do you know whether or not he subsequently took water in after years over the Oro*f*ino and Gri*zl*y Gulch where Hale takes it now?

A. I don't know whether he took it there or whether it was taken there after. [93]

Q. You may state for how long after he quit mining in Holmes Gulch it was that this water was taken over into Grizzly and Oro Fino Gulches so that it would not find its way back into Prickly Pear Creek?

A. I can't state how long, but I know that that flume that carried the water around into Holmes Gulch fell down several years after he built it, but it run there for several years anyway.

Q. Could you approximate how many years after 1872 it was used there for mining in Holmes Gulch?

A. I think that there was water ru*n*ing there until 1875.

Q. Could you tell us about what time it was that

(Testimony of Christmas G. Evans.)
the water was taken across the divide into Oro Fino and Grizzly Gulches?

A. No, sir, I was not up in that country; I don't remember.

Q. Do you recall whether or not you furnished any lumber to build flumes for the extension of that ditch across the divide?

A. Well, I presume we did, but I could not state now.

A. Would your books show?

A. Our books would show, of course. [94]

Q. Did you own a ranch at the Prickly Pear Valley in connection with your partner, Mr. Sanford, at the time Mr. Wolfolk was building a ditch tapping the tributaries of Prickly Pear creek?

A. In 1870?

Q. Yes, and later years?

A. Yes, sir; we owned a ranch there.

Q. Did you ever sign an agreement that Mr. Wolfold circulated among the ranchers of Prickly Pear Valley allowing him to take that water and reservoir it? A. No, sir.

Q. Did you hear of such an agreement or petition?

A. Yes, sir; I have heard of such an agreement?

That's all.

Witness excused. [95]

[Testimony of H. L. Cram (in Rebuttal).]

H. L. CRAM, a witness in rebuttal.

Direct Examination.

(By Mr. McCONNELL.)

Q. You have been sworn as a witness in this case

(Testimony of H. L. Cram.)

before? A. Yes, sir.

Q. And you are one of the intervenors in this action? A. Yes, sir.

Q. How long have you been living in the Prickly Pear Valley? A. Thirty-one years.

Q. You may state whether or not you ever signed an agreement circulated by Mr. Wolfolk and his associates, in reference to his taking the waters from the tributaries of Prickly Pear Creek and reservoiring them? A. No, sir.

Q. Do you know of anyone in the valley who did sign such an agreement or petition?

A. No, sir.

Q. Did your predecessors in interest sign such an agreement? A. He told me he never did.

Q. Who was your predecessor?

A. Harvey Jones; J. H. were his initials. [96]

[Testimony of Hugh J. Rogan, for Complainant (in Rebuttal).]

Whereupon HUGH J. ROGAN, a witness called and sworn in behalf of complainant, in rebuttal, testified as follows:

Direct Examination.

(By Mr. McCONNELL.)

Q. You are the same Hugh J. Rogan that has testified heretofore in this cause, are you?

A. Yes, sir.

Q. How long have you been engaged in ranching in the Prickly Pear Valley? A. 25 years.

Q. How long have you owned a ranch in the

(Testimony of Hugh J. Rogan.)

Prickly Pear Valley? A. 25 years.

Q. Did you know a man named A. M. Wolfolk when he was living in the city of Helena?

A. Yes, sir, I knew the gentleman.

Q. Did you ever hear of this agreement that has been testified to here on behalf of R. S. Hale that Mr. Wolfolk desired to have the ranchers of Prickly Pear sign? A. I have heard of it.

Q. Did you ever sign such an agreement?

A. No, sir.

Q. Do you know whether or not your predecessor in interest ever signed such an agreement?

A. They told me not; that is, Harry Nafus told me.

Q. Do you know of anyone in the Prickly Pear Valley who did sign such an agreement?

A. No, sir.

Q. Prior to the commencement of this suit in 1903, when, if at all, was there a shortage of water among the ranchers in the Prickly Pear Valley, in Lewis and Clark County?

A. Well, the shortage started to come along about, say, 1895 or 1896, and from that on down. [97]

[Testimony of S. M. Meadows, for Complainant (in Rebuttal).]

MEADOWS RIGHT.

Whereupon S. M. MEADOWS, a witness called and sworn in reference to the S. M. Meadows right, and in rebuttal, by complainant, testified as follows:

Direct Examination.

(By Mr. McCONNELL.)

Q. What is your full name, residence and occupation?

(Testimony of S. M. Meadows.)

A. Samuel M. Meadows; I live in the valley, post-office at Helena.

Q. And your occupation? A. Ranchman.

Q. How long have you lived in Montana?

A. Twenty-six or seven years.

Page 1738.

Q. Mr. Meadows, did you ever hear of the agreement that was circulated by A. M. Wolfolk among the ranchers in the Prickly Pear Valley, in which he asked them to allow him to divert water of some of the tributaries of Prickly Pear Creek over into Holmes Gulch. Did you ever hear any talk about that? A. I don't remember it.

Q. Did you ever sign such an agreement, allowing him to take the waters away from Prickly Pear Creek, so that it would not flow down to you?

A. No, sir.

Q. Do you know whether or not any of your predecessors in interest, or anyone ever owning the ranch you now live on, signed such an agreement?

A. Not to my knowledge.

Witness excused. [98]

That on the 15th day of June, 1911, an Opinion was duly filed herein, being in the words and figures following, to wit: [99]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation, et al.,
Defendants.

Memoranda for Decision.

DIETRICH, District Judge:—

The record in this suit is voluminous, and was submitted upon a very brief oral argument. It is not impossible that I have inadvertently overlooked certain features of the record or have failed to give to certain facts their true significance. I have therefore thought it best to prepare tentative findings upon the cardinal issues, leaving the matter open temporarily for counsel to suggest wherein, under the record, a decree in accordance with such findings would be unjust. The schedule of dates and amounts hereto appended will therefore be deemed to be the basis of the decree, but will be subject to correction. However, it will not be understood that the case is to be reargued. Suggestions of change are invited only where the finding is without support in the record, or where there is some inadvertence as to the name of the owner or the stream from which

the water is diverted, or where it clearly appears that a decree in accordance with some one of the findings would operate harshly or unjustly.

Water suits involving numerous claims invariably present a great many perplexing questions, and the complications are always multiplied by the lapse of time, and very much augmented where, as here, many of the original appropriations of water were made primarily for mining purposes and at a time when there was very little law upon the subject. Many of the appropriations claimed in this case reach **[100]** back into the '60's, and those who made the appropriations doubtless little anticipated the conditions which have since developed. As in nearly all water cases, especially those involving early rights, the testimony is at best vague and uncertain, and in many respects highly conflicting.

Two features of the record here have been the source of much perplexity. Several of the larger rights were involved in a former suit which went to judgment in the State Court, and this judgment is doubtless binding as between the parties thereto. The substantial correctness of the findings in that case is not seriously called into question here, and upon the whole I have concluded it to be best not only to recognize the judgment as binding between the parties thereto, but also to take the same view of the facts as between all of the parties that the Court took in that case. While a different view of the facts is entirely possible, the conclusions reached in that case are not out of harmony with the record made in this case, and therefore even where this Court is permitted to act independently it has been deemed

to be wise to lean toward the findings and conclusions incorporated in that decree.

The other feature which has been the source of much perplexity is the extreme meagerness, if not in some cases a total absence, of proof as to the amount of land actually cultivated and irrigated, and the amount of water necessary for the irrigation thereof. So meager is the record that apparently the case was tried largely upon the theory that it was not necessary to offer evidence upon these issues. In many, if not in most, of the cases the claimants rely upon the actual diversion and use of water, the appropriations having been made before there was any statutary law prescribing the manner in which water could be appropriated. As I understand the rule in such cases, it is that in order to complete the appropriation the claimant must not only divert and carry to the point of intended use the water claimed by him, but he must apply it to a beneficial use. [101] He has a reasonable time in which to make such application, but he must make it. His right does not become complete until he makes use of the water, and he has a right only to so much as is reasonably necessary for the specified use. Upon a few claims only have we the definite testimony of a civil engineer who was sent upon the ground to make actual measurements of the amount of land under cultivation. Where the appropriation is claimed as of a date forty or twenty, or even fifteen years, prior to the commencement of the suit, it became material to know how much land had been put under actual irrigation,

and how much water was necessary for the irrigation of that land. Ordinarily, the claimant's right would not exceed the amount necessary for the irrigation of the land which he had actually brought under cultivation within such period. Generally, I have assumed an allowance of about fifty inches to eighty acres of land to be sufficient for the irrigation thereof. The rule, cannot, however, be rigidly applied. There are differentiating conditions. A very small claim presents some difficulties. It is doubtless true that upon lands of a certain character it is quite impracticable to use a head of water of less than twenty or twenty-five inches, and as a rule it is much better to have at least twice that amount. But upon the other hand, it would be unjust to allow a claimant twenty or twenty-five inches of water for the irrigation of three or four acres of land; such a use would be wasteful. The claimant who has only three or four acres of land can doubtless arrange with other claimants for the periodic use of a larger amount. It is well-known that rotation of use prevails in many communities where the holdings are small, such a method being necessary to avoid waste. It is suggested that if those who have only small acreages to irrigate feel that it will be impracticable for them to use the comparatively small amounts to be decreed to them continuously and that they cannot safely rely upon a voluntary [102] arrangement for rotation of use with other claimants, consideration will be given to the question of decreeing to them larger amounts, to be used periodically.

As to the earlier rights, those claimed from '63

and '64 and '65 and '66, I am inclined to think that substantial justice could be most neerly approximated by making awards to all claimants as of the same date, but by reason of the decree in the State Court such course seems to be impracticable. It is virtually impossible to determine with any degree of certainty upon what particular day, as a matter of fact and under the law, a water right fully accrued in those earlier years. The mere fact that some kind of a diversion was made for some purpose is not conclusive. The early ditch may have been very small and crude, as it often was, and was used for the diversion of a very small amount of water. The first and larger use was often only for a mining purpose, which is quite different in its effect from an agricultural purpose, in one case the water returning to the stream and in the other being lost to lower appropriators. While, of course, exact justice would not be done by placing all of the earlier appropriations upon the same plane, exact justice, under the circumstances, is impossible. Our conclusions are at best drawn from vague and uncertain evidence of crude conditions often difficult of legal classification.

With these observations, it is suggested that the following findings will be adopted as the basis for a decree, unless good reason is shown why, in specific particulars, they are erroneous and should be modified.

CLAIMANTS REPRESENTED BY McCONNELL & McCONNELL.

As I understand, all of the claims, both those of

the plaintiff and those of the intervenors, represented by Messrs. McConnell & McConnell, were involved in the suit of Calvin Beach vs. Flowerree, and others, in the State Court, and the claims made are in accordance with the decree in that case, and the findings [103] here made are also in accordance therewith. Hence,

The Ames Realty Company is entitled to 100 inches, from April 1, 1865; 190 inches, from April 1, 1866; and 167 inches, from April 6, 1866.

OF THE INTERVENORS.

William Warren is entitled to 98 inches, from April 1, 1866.

John L. Bunnell is entitled to 100 inches, from April 1, 1866.

Hugh Rogan and Patrick Rogan are entitled to 76 inches, from April 1, 1866.

H. L. Cram is entitled to 50 inches, from April 8, 1866.

Martin Woldson and T. W. Bynott are entitled to 134 inches, from April 8, 1866.

S. M. Meadows is entitled to 100 inches, from April 8, 1866.

W. L. Milligan is entitled to 20 inches, from March 1, 1865.

W. L. Milligan is entitled to 20 inches, from May 1, 1866.

Peter Hilger is entitled to 67 inches, from April 4, 1866.

Peter Hilger is entitled to 100 inches, from Nov. 24, 1866.

W. G. Preuitt is entitled to 100.5 inches, from April 20, 1866.

W. G. Preuitt is entitled to 50 inches, from May 10, 1866.

W. C. Preuitt is entitled to 100 inches, from April 1, 1867.

A. P. Hansen is entitled to 50 inches, from Nov. 24, 1866.

A. P. Hansen is entitled to 67.5 inches, from Feb. 10, 1869.

A. P. Hansen is entitled to 37.5 inches, from Oct. 15, 1866.

John Bower and C. B. Kountz, Sophia Symes, Catherine Symes, John Symes, and George Symes are jointly entitled to 112.5 inches, from October 15, 1866.

D. A. G. Flowerree is entitled to 33 inches, from May 1, 1865.

D. A. G. Flowerree is entitled to 184 inches, from April 6, 1866.

All of the foregoing rights, both of the plaintiff and of the intervenors, are in Prickly Pear Creek.

CLAIMANTS REPRESENTED BY MR. SPAULDING.

Robert Strobel is entitled to 15 inches from Clancy Creek, from May 1, 1891.

A very strong plea is made upon behalf of this claimant, [104] based upon the theory that his use of the water does not diminish the flow of the stream. It is contended that because the lands of the claimant are contiguous to and slope rapidly toward the creek, and the soil is porous, the flow of the water

in the channel below the claimant's land is not appreciably diminished by reason of his use for irrigation purposes. This contention is very frequently put forward in water suits, and, of course, is usually advanced by the late appropriator and resisted by the early appropriator. While the record contains much in support thereof, I have not found it practicable to formulate a decree recognizing the theory and at the same time protecting the rights of the older appropriators. It is quite probable that if the claimant uses water very liberally upon his land during the flood season, thus thoroughly saturating it, the flow of the stream at some time thereafter, and for an indefinite period, would be augmented by the drainage, through percolation and otherwise, from the land. But I have not been able to see how a decree can be formulated upon data so meager. There is no answer to the question how soon after the water is placed upon the land the drainage will commence, or how long it will continue. It is doubtless true that some of the water placed upon the land during the low-water season will percolate back into the channel, but certainly not all of the water would find its way back, and it is impossible to determine from the record what specific amount the claimant should be credited with. While I would like in some way to protect the claimant in his use of the water in so far as such use does not infringe upon the rights of early appropriators, I see nothing to do at the present time but to determine the amount and date of his right and leave the question as to whether or not his use interferes with the rights of others to

future consideration. Certainly if his use of the water does not diminish the flow of the stream, such use would not infringe upon any other right, and therefore would not be in violation of the injunctive provision of the decree. [105]

CLIENTS OF SHOBER & RASCH.

M. A. Haynes is entitled to 60 inches from Clancy Creek, from April 1, 1865.

E. L. Marks is entitled to 32 inches from Lump Gulch Creek, and 16 inches from Prickly Pear Creek, from April 1, 1882.

Mary B. Logan is entitled to 27 inches from Warm Springs and Prickly Pear Creeks, from April 1, 1865.

A. H. Moulton is entitled to 45 inches from Prickly Pear and Beaverton Creeks, from April 1, 1865.

George Cockell is entitled to 35 inches from Prickly Pear Creek from April 1, 1865.

I. W. Marks is entitled to 21 inches from Prickly Pear Creek, from April 1, 1865; 8 inches from Dutchman Creek, from April 1, 1893; 7 inches from Dutchman Creek, from April 1, 1894.

Christian Nelson is entitled to 33 inches from Prickly Pear Creek, from April 1, 1865.

J. A. Fischer is entitled to 8 inches from Dutchman Creek, from April 1, 1870.

Christina Winslow is entitled to 21 inches from Dutchman Creek, from April 1, 1870.

Asleck Slenes is entitled to 22 inches from Prickly Pear Creek, from April 1, 1872.

P. A. LaRoy is entitled to 22 inches from Prickly Pear Creek, from April 1, 1872.

William Ogilvie is entitled to 22 inches from Warm Springs Creek, from April 1, 1886.

Herman Freyler is entitled to 10 inches from Homestake Creek, from April 1, 1872.

(The decree will provide that he may take this amount of water to the exclusion of all others absolutely after June 1st of each year, it appearing that naturally the creek discharges no water into Prickly Pear creek after that date.)

CLIENTS OF MR. HEYWOOD.

Catherine Sherman, as administratrix of the estate of William R. Sherman, deceased, is entitled to 25 inches from Prickly Pear Creek, from January 13, 1896; 10 inches from Shingle creek, from April 13, 1892.

(The decree will award to her all of Shingle Creek absolutely against all other claimants, it not being a tributary of the main stream during low-water season; also decree to her absolutely the spring located at point described at page 696 of testimony.)

Michael Foley is entitled to 30 inches from Lump Gulch Creek, from May 1, 1895. [106]

Charles Grossman, successor of Lind Warneck, is entitled to 12 inches from Little Buffalo Creek, from October 7, 1889.

Charles Grossman, as successor of Kate Cassidy, is entitled to 15 inches from Big Buffalo Creek, from April 1, 1896.

Harry Johnson is entitled to 16 inches from Lump Gulch Creek, from April 1, 1892.

Conrad-Stanford Company, a corporation, is entitled to 500 inches from McClellan Creek, from October 15, 1868.

CLIENTS OF MR. HEPNER.

Lawrence Wonderer is entitled to 20 inches from Prickly Pear Creek, from April 1, 1865; all of Strawberry Creek absolutely against all other claims, it not being tributary during the low-water season.

H. M. Hill is entitled to 5 inches from Clancy Creek, from April 1, 1865.

Charles B. Jastrow is entitled to 20 inches from Lump Gulch Creek, from April 1, 1882.

CLIENTS OF WALSH & NEWMAN.

Harry C. Burgess, successors to Reynolds Prosser, is entitled to 67 inches from Prickly Pear Creek, from September 30, 1862; 35 inches from Prickly Pear Creek, from January 1, 1869; and 1174 inches from Prickly Pear Creek, from May 1, 1889, the use thereof to be confined to power purposes, the water to be turned back in the stream without appreciable diminution of quantity or deterioration of quality.

The decree will also declare Burgess to be the owner of the two springs which he has developed (description of the springs will be found on last page of counsel's brief).

CLIENTS OF MR. HORSKY.

Harvey S. Mitchell, successor of Robert Robinson, successor of James H. Mulholan, is entitled to 22 inches from Jackson Creek, from April 1, 1887.

Gerhard Thies is entitled to 16 inches from Jackson Creek, from April 1, 1884.

The decree will provide that these two claimants are absolutely entitled to all the waters of Jackson Creek during the low-water season, the creek at that time not being a tributary of Prickly Pear Creek,

their rights, however, to be subject to those of Dina S. A. Turner.

Christian Wickersham is entitled to 15 inches from Spring Creek, from April 1, 1865.

CLIENTS OF MR. THOMPSON.

Helena & Livingston Smelting and Reduction Company is entitled to 80 inches from Prickly Pear Creek, from March 1, 1865; 80 inches from Prickly Pear Creek, from May 1, 1866; also 3,000 inches from Prickly Pear Creek, at the town of Jefferson, for power [107] purposes only, from April 29, 1875; also 25 inches from Golconda Creek; 100 inches from East Fork Creek; 50 inches from West Fork Creek; 250 inches from Beaver Creek; 100 inches from Weimer Creek; 150 inches from Anderson Gulch Creek; and 250 inches from Prickly Pear Creek, all for power purposes only, from March 10, 1896; also all the waters of Spring Creek, for power purposes, at the Corbin concentrator, from April 1, 1868.

(In all cases where the appropriation is for power purposes only the decree will make proper provision for the turning of the water back into the stream without diminution and without injury to appropriators for agricultural purposes.)

CLIENTS OF GALEN & METTLER.

Dina S. A. Turner, administratrix of the estate of David C. Turner, deceased, is entitled to 90 inches from Jackson, Lost and Crystal creeks, from January 1, 1866.

(The record does not seem to disclose clearly the relation of this claimant's right in Jackson Creek to the claims of Mitchell and Thies. The latter claim-

ants apparently contend that they take all of the water of this stream. Possibly, their points of diversion are lower down than that of Turner, and they have simply taken the surplus, their rights being subsequent in time. Unless counsel for these three parties can stipulate the form of the decree in this respect, it may be necessary to take additional evidence upon the point.)

B. Z. and J. W. Young, jointly, are entitled to 150 inches from McClellan Creek, from June 15, 1868.

T. H. Carter and B. R. Young, jointly, are entitled to 15 inches from Clark's Creek, from April 1, 1865.

Also 200 inches, from June 1, 1863, for mining purposes, the water to be turned back into the stream for agricultural uses.

(This claim presents serious difficulties. Except in so far as the water was used in connection with dredging operations, no use of the original appropriation has been made for a great many years, and were it not for the dredging operations apparently the right should be declared to have been forfeited by reason of nonuser. If the water is simply used for dredging purposes and permitted to go back into the stream, perhaps it is not very important to determine the exact amount to which the claimants are entitled.)

CLIENTS OF MR. BULLARD.

James Clegg, Perry H. Park, and Frank H. Turner, jointly, are entitled to 200 inches from Prickly Pear Creek, from April 1, 1865, for mining only, and after use must be turned back into the stream.

Hedvig Maria Erickson, successor to Martin

Broen, is entitled to 75 inches from Beaver Creek, from April 1, 1866.

Charles E. Brown, successor to J. J. Hall, is entitled to 30 inches from Spring Creek, from April 1, 1865; 40 inches from Prickly Pear Creek, from April 1, 1879.

Robert S. Hale is entitled to 400 inches from Lump Gulch Creek, from April 1, 1870.

(I am inclined to think that the decree should provide that the claimant may take all of the water of Lump Gulch Creek which flows down to his diverting works, not exceeding 400 inches, provided that he maintains the reservoir or artificial lake [108] practically in its present condition, so that lower appropriators will get the benefit of the seepage therefrom.)

CLIENTS OF D. M. KELLEY.

Christ Olsen, successor of Ole Noer, is entitled to 25 inches from Beaverton Creek, from May 1, 1880.

Counsel for the several parties will be given thirty days from the date hereof in which to suggest errors in the foregoing awards, within the scope of the suggestions hereinbefore made.

Upon the filing hereof, the clerk will forthwith give notice to all of the attorneys, and upon the expiration of the thirty days from the date hereof, the clerk is requested to forward to me any requests that may have been filed for modification of the suggested findings.

Dated this 14th day of June, 1911.

FRANK S. DIETRICH,
District Judge.

It is desirable that any suggestions offered should be clearly and concisely stated, with specific references to the testimony or other records relied upon.

[Indorsed]: Title of Court and Cause. Memoranda for Decision. Filed June 15, 1911. Geo. W. Sproule, Clerk. [109]

And thereafter, on August 7th, 1911, an Opinion was duly filed herein, which is in the words and figures following, to wit: [110]

In the Circuit Court of the United States for the District of Montana.

AMES REALTY COMPANY,

Plaintiff,

vs.

BIG INDIAN MINING CO. et al.,

Defendants.

Memorandum.

DIETRICH, District Judge:

A number of suggestions have been offered for the modification of the findings proposed in the memorandum of decision heretofore filed, and my conclusions are briefly stated as follows:

It was said in the memorandum that "where the appropriation is claimed as of a date forty or twenty or even fifteen years prior to the commencement of the suit, it became material to know how much land had been put under actual irrigation and how much water was necessary for the irrigation of that land. Ordinarily, the claimant's right would not exceed the amount necessary for the irrigation of the land which

he had actually brought under cultivation within such period." In comments upon this statement made in one of the briefs the term "appropriation" is frequently used apparently as a synonym of the term "diversion." Ordinarily, appropriation of water is not consummated until the water has been diverted from the stream, carried to the place of intended use, and is actually applied to such beneficial use. Where the claimant relies upon actual appropriation as the basis for his right, he should be awarded the right as of the date of the diversion, only upon condition that he has applied the water to a beneficial use within a reasonable time. No definite period can be fixed for the reason that the circumstances and conditions of each appropriation are to be taken into consideration in determining whether the application has been made within a reasonable time. It was and still is thought that in the absence of some showing disclosing unusual conditions the failure of one who diverts water, to make **[111]** application thereof to the land for which it is claimed within forty or twenty or even fifteen years should deprive him of the right to claim an appropriation of the water as of the date of the original diversion. One who would acquire such a right, which is in the nature of a gratuitous grant, must act with reasonable diligence in complying with the conditions of the grant, one of which is the beneficial application of the water. This view is not inconsistent with anything said by the Supreme Court of Montana in the cases cited, and is in harmony with the general rule prevailing in the arid regions.

SUGGESTIONS MADE BY MR. McCONNELL.

All of the suggestions made in the brief filed by Mr. McConnell, except those relating to the right of Robert S. Hale, concern the propriety of awarding certain small streams absolutely to the claimants. I think the record is sufficiently definite and certain to authorize the finding that the plaintiffs and intervenors would receive no benefit from these streams if they were permitted to flow without interruption. The waters thereof would not reach the streams tapped by the ditches of the plaintiffs and the intervenors. It is possible that in an extraordinary season there would be a little overflow, but I still am of the opinion that it is proper to decree these waters to the claimants absolutely. Hence no changes will be made as to the rights of *Herman Freyler, Catherine Sherman, Lawrence Wonderer* and *Harvey S. Mitchell.* The *Robert S. Hale* right is considered under the head of Galen & Mettler's clients.

CLIENTS OF GUNN & HALL.

In the case of *E. L. Marks* it is urged that a larger amount be awarded, for the reason, as stated, that the claimant has 75 acres under cultivation. At page 1682 of the record, it conclusively appears that at the commencement of the suit he had only about 64 acres under cultivation, and shortly before the trial he had cleared [112] an additional four acres, making at the most 68 acres, for the irrigation of which he was awarded 48 inches of water. I am not convinced that my original conclusion was in this respect unjust.

Upon a review of the record, however, I have de-

cided to give this right the earlier *date of April 1, 1865,* instead of the date of April 1, 1882. The conflict in the testimony upon this point is a peculiar one, and in fixing the date as of April 1, 1882, I took the testimony of James B. Halford as perhaps the most credible. I overlooked the testimony of his brother Dodley Halford, which is in direct conflict with that of James B., and inasmuch as Dodley Halford's recollection of the facts is corroborated by the testimony of some other witnesses I have decided to adopt the earlier date.

As to the *Christian Nelson* claim, it appears that it is 17,400 feet from the point of diversion to land where the water is used. On account of the length of the ditch and other conditions, the loss of the water is abnormal. I have, upon reconsideration of the record, decided to award to him *55 inches* instead of 33 inches.

As to the rights of *I. W. Marks* and *George Cockell,* no new considerations are brought to my attention which are deemed sufficient to warrant a modification of the award heretofore suggested.

As to the *Chris Wickershein* right, I think it must be found as a fact that this right, which dates from 1865, was never used upon more than eight acres. In other words, the beneficial use of the claim is confined to eight acres of cultivated land. The witness Helmick, who made measurements of the land, fixes the amount at 7.8 acres. This witness estimated that 15 inches would be a fair allowance for the land, with the explanation that while that amount could not be used all the time, a smaller stream would not go

through the ditches. I am urged to increase the amount to 25 inches, but it is not thought that the reasons given in support of the request are sufficient to warrant such an increase. The conditions are somewhat peculiar, and upon consideration I have decided to raise the amount to *18 inches.* [113]

As to the other suggestion upon behalf of this right, I do not find the record sufficiently definite to warrant me in decreeing definitely that Wickershein may use the whole of the flow of the stream at any time. Of course, if the amount of the flow in excess of his right is insufficient during a period of the year to be available for any other claimant, his use of such excess would be without injury to such other claimant, but it is not thought that the facts are sufficiently clear to warrant a decree authorizing such use at any particular period.

CLIENTS OF MR. BULLARD.

No substantial reason appears in the suggestions of counsel why a change should be made in the award heretofore suggested for the Clegg, Park and Turner claims. The date of the *Erickson* right will be changed from April 1, 1866, to *April 1, 1865.* The evidence supports the latter date. The pleading, however, should be amended to conform to the proof, the claim of the pleading being only from 1866.

In the matter of the Hall right, now owned by *Charles E. Brown,* I have concluded to award *60 instead of 30 inches* from Spring Creek, as of the date of April 1, 1865. The other award of 40 inches from Prickly Pear Creek, as of April 1, 1879, is permitted to stand. Counsel now suggests that Brown

be awarded the whole of Blue Bell Creek, dating from the year 1876, but I find no warrant in the evidence for such a provision in the decree. My attention is not called to any testimony from which it appears that the waters of this stream do not reach Prickly Pear Creek, or that Brown ever claimed the exclusive right to the whole of the stream. So far as I have been able to discover, this claim is asserted for the first time in the suggestions now made, since the filing of the original memorandum. I do not find among the files the cross bill in which the Hall or Brown right is set up, but neither in the testimony, so far as I have been able to discover nor in the original brief filed upon behalf of Brown, is there any suggestion that the waters of this stream be decreed to Brown absolutely. [114]

As to the claim of *Robert S. Hale,* counsel urges that the decree suggested should be modified in several particulars. It is first contended that inasmuch as the Park ditch was "located" in the fall of 1869, the right should relate back to that date. But where for appropriation reliance is had upon the actual diversion and use of water, the rights thus acquired do not relate back to the mere location of the ditch, but at most cannot be held to antedate the actual diversion of the water.

In the second place, it is urged that the claimant is entitled to all of the waters of Lump Gulch Creek, and should not be limited to 400 inches. But the claimant, testifying upon his own behalf, stated that there were times when some of the water of the gulch wasted over his dams. He further estimated the

carrying capacity of the ditch at about 400 inches. I am therefore still of the opinion that the original date and amount of the appropriation are as nearly correct as is possible to approximate under the evidence.

The third contention, and that most elaborately discussed by counsel for the claimant, is that, regardless of the date of the appropriation, the claimant should be awarded the waters of the stream absolutely, notwithstanding earlier appropriations of water. The contention is urged upon two different grounds, one being that about the time the claimant's ditch was constructed, other claimants of waters from the stream waived their prior rights. While the evidence is sufficient to support a finding that a written waiver was circulated among the users of the waters of the stream and was signed by some of them, there is insufficient evidence from which to find that all of the claimants waived their rights. As an illustration of the character of the evidence upon this point, reference is made to the testimony of the claimant himself. At page 971 he stated that he and his associates bought the rights of all of those who would not consent to waive their rights. The waiver, he says, was in writing, and the instrument cannot be found. In reply to a question as to whether or not he ever saw the written waiver, his answer is, "I saw it before it was sent out for circulation, but as to whether I saw it after, I [115] don't know. Colonel Wolfolk was General Manager, and he was attending to it." That he saw an unsigned agreement is proof of nothing. The question is who

signed the paper, and what in substance did it contain. As already suggested, while the testimony is sufficient from which to find that an effort was made to procure a waiver of all prior rights, and that some of the claimants signed such waiver, the record does not warrant a finding that all prior rights were waived.

The other ground upon which the claimant relies for absolut*el* ownership is adverse user or title by prescription. The contention I think must, however, be disposed of adversely to the claimant upon his own testimony. Upon page 976 of the record, upon being recalled, the claimant testified that his storage of the waters and his use thereof have not prejudiced or interfered with the rights of other claimants diverting water from the stream below his point of diversion. Speaking of his use of the water, he expressly says: "It has the effect of keeping the waters up below that point (his point of diversion). There is a large seepage from the lake which flows back into Lump Gulch and helps to keep the water up during the months of July, August, and September, when the people need it." Upon the same page he says that the volume of water in Lump Gulch, below his point of diversion, is greater during the farming season than it would be if the stream were left in its natural condition. Indeed the view of the claimant is very succinctly and clearly stated in the supplemental brief filed upon his behalf, as follows: "The testimony as outlined in the former brief in behalf of this defendant, and as the same appears of record, is conclusive, uncontradicted, unas-

sailed, that the use of all waters of Lump Gulch above the head of defendant's ditch never has deprived and does not now deprive, and cannot deprive, the complainant, or any other user of water, of any water to which they are or may be entitled, for the reason that the reservoiring of the waters in the Park Lake of the defendant results in a seepage coming into Lump Gulch, below the head of the defendant's ditch that supplies a larger amount of water below the point of defendant's diversion than would flow down said stream [116] if the waters were not in fact diverted by the defendant Robert S. Hale, and reservoired during the season of high water." If this be true, how can it be possible to hold that the claimant has acquired any right by adverse user? If the facts are as they are here stated to be, there has never been any hostile use of the water, there has never been any invasion of the rights of any other claimant upon the stream, all the claimants have always gotten all the water that they have been entitled to, and have had no reason to complain of the claimant's use. The essential elements of adverse user are wanting.

In the former memorandum it was tentatively suggested that the decree provide that the claimant should take all the waters of Lump Gulch Creek not exceeding 400 inches, upon the condition that he maintain the reservoir or artificial lake practically in its present condition so that the lower appropriators would get the benefit of the seepage therefrom. This suggestion was made upon the assumption that there is no question that the seepage is substantially equivalent to the natural flow of the stream.

However, both the claimant and the plaintiffs and intervenors for divers reasons now express dissatisfaction with such proposed provision in the decree. It is difficult to understand upon what theory the claimant can properly object thereto. Even if it were found that earlier appropriators of water waived their rights so far as they were to be impinged by the construction and maintenance of the claimant's diverting works, it does not follow that they have also given their consent to being entirely deprived of the use of the waters of Lump Gulch Creek. It is not unreasonable to assume that in seeking the waiver it was represented, upon behalf of the claimant and his predecessors in interest, that the reservoiring of the water would do earlier appropriators no substantial injury, inasmuch as they would receive the advantage of the large seepage during the dry months of the farming season. And as to the claim of a prescriptive right, it could in no case exceed the extent of the adverse user out of which it has grown. **[117]**

Upon reconsideration of the record, and especially of the practicability of making provision in a decree by which other users of the waters of the stream will be assured of a continuance of the present amount of seepage from the claimant's reservoir, I have concluded it better to decree the amount of water to which the claimant is entitled, together with the date of his right, and leave the question open as to whether or not the seepage at any particular time is equal to the natural flow of the stream. If, as is asserted by the claimant, the seepage is equivalent to such natural flow, a prior appropriator cannot complain of his

diversion. *Hale will therefore be awarded 400 inches from April 1, 1870.*

CLIENTS OF MR. HEPNER.

The amount awarded to *H. M. Hill* is increased from 5 to *10* inches. It may be that the larger part of this will be lost if the claimant undertakes to use just the 10 inches at all times, but doubtless he can make some arrangement for rotation of use so that he will have an irrigating stream for a short period, and then cease to use the water entirely for a certain period.

CLIENTS OF GALEN & METTLER.

Both the date and amount of the *Dina S. A. Turner* right will be modified, and she will be awarded *125* inches, dating from *August 1, 1866.* Upon a re-examination of the record, I am satisfied that the date originally given, namely, January 1, 1866, was due to inadvertence. The testimony is not very clear upon the point, but upon the whole I have concluded that August 1, 1866, is approximately the date when the water was first used.

My attention is called to the fact that the place of application of the water is about nine miles from the point of diversion, and that necessarily there must be considerable loss by seepage and evaporation. The carrying capacity of the ditch is left very much in doubt, one witness giving it at about 100 inches, and another at about 150 inches. The water is used for both mining and agricultural purposes. Justice to a certainty is impossible upon such an indefinite [118] and unsatisfactory record, but perhaps 125

inches is a reasonable approximation of the amount to which the claimant is entitled.

I cannot yield to the claimant's contention that she be awarded all of the waters flowing in Jackson Creek, Lost Creek, and Crystal Creek, absolutely. A case is not presented where the water, if permitted to flow down the natural channels of these streams, would not reach Prickly Pear Creek. It is true the claimant contends that she has always used the entire amount of water now claimed, but such a contention is made in nearly every case.

As to the irrigation rights of T. H. Carter and B. R. Young no substantial reasons are urged for modifying the award originally suggested. It is true that 15 inches do not furnish a very large irrigating head, but obviously it would be unjust and contrary to public policy to decree to a claimant the right to use 40 or 50 inches of water for the irrigation of 10 or 15 acres of land because less than that amount is not a good irrigating head. It is not doubted that where the amount awarded is insufficient for a good irrigating head rotation of use can be arranged for either voluntarily or compulsorily.

As to the other claim of Carter and Young, I have concluded to award 1,000 inches instead of 200 inches, dating from June 1, 1863, from Prickly Pear Creek, for mining and milling purposes, the decree to provide that the water thus used is to be turned back into the stream, without substantial diminution for agricultural uses.

My original view was, not that the right should be declared to have been abandoned, but that it should

be declared to have been forfeited, in part at least, for nonuser. The record unequivocally shows that there has been little use of the water for approximately 20 years, and that the ditches through which the water is diverted from the natural stream have been filled up and destroyed. While there is considerable evidence from which the intention to abandon could be inferred, upon the whole, I think it must be concluded that such intention has not, as a matter of fact, ever existed. A distinction, however, is made between abandonment, always involving intention, and [119] forfeiture because of nonuser. Forfeiture by nonuser does not involve an intention upon the part of the claimant to relinquish his right; forfeiture is against his will. The distinction is clearly made in *Smith* vs. *Hawkins* (Cal.), 42 Pac. 453. I find, however, upon examination of the statutes, that the California statute, like that of Idaho, is different from that of Montana. Both the California and Idaho statutes provide that when the appropriator "ceases to use it (the water) for such a purpose (a useful or beneficial purpose) the right ceases." Section 2 of the Montana act, approved March 12, 1885, as read into the record, at page 1280, provides that the appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest "*abandons and ceases to use the water for such purpose the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact.*" Apparently under this section the right can be lost only by voluntary abandonment.

While no case from the courts of the state of Montana has been called to my attention wherein the precise question is decided, several cases have arisen where the doctrine of abandonment has been clearly recognized and announced, the rule there being, as in other jurisdictions, that abandonment involves an intention on the part of the appropriator to reliquish or let go of his right.

It further appears that the abandonment or forfeiture of this right is not affirmatively put in issue by any of the pleadings.

Counsel for the plaintiff and the intervenors are directed to prepare a decree in accordance with the original memorandum of decision, with modifications as hereinbefore suggested. No findings of fact or conclusions of law need be prepared, and the decree shall contain no recitals other than those prescribed by the general equity rules. Care should be taken to prepare the schedule of the several rights in such a way as to be subject to easy reference, and it is suggested that the rights be arranged in two different groups, one embracing all agricultural rights and the other embracing mining, milling and power rights, and that in each group the names of the owners be arranged **[120]** alphabetically. The decree should by apt language provide that waters used for mining, milling and power purposes should be turned back into the stream without substantial diminution. The streams from which the water is to be diverted in each case should be named. From what was said at the oral argument, it is probably impracticable specifically to describe the point of diversion or the place

of use, but at least the stream from which the water is diverted should be named. In all cases the amount awarded is to be measured at the point where the water is diverted from the natural stream. The decree should contain the ordinary provision enjoining each of the parties from interfering with the rights of any other party to the suit, and there should be expressly reserved to the Court jurisdiction over the parties and the several claims for the purpose of enforcing the decree through a water master or commissioner, and also compelling rotation of use where such method of applying the waters is necessary or highly desirable.

From time to time, suggestions have been made that in some instances the decree run in favor of present owners, who are not parties to the suit, the claims having been transferred since the pendency thereof. Counsel desiring such provision in the decree should call the matter to the attention of counsel for the plaintiff, and a stipulation should be filed so that there will be something in the record warranting such form of decree. It is further suggested that in any such case the decree expressly state that the person to whom the water is awarded is the successor in interest of the proper party to the suit, naming him.

Before the form of decree is sent for signature, it is suggested that it be exhibited to the several attorneys of record for their approval, in order that inadvertent errors may be avoided.

Dated this 4th day of August, 1911.

[Indorsed]: Title of Court and Cause. Memorandum. Filed Aug. 7th, 1911. Geo. W. Sproule, Clerk. [121]

And thereafter, on October 7, 1911, a Final Decree was filed and entered herein, being in the words and figures following, to wit: [122]

[Final Decree.]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation, Helena and Livingston Smelting and Reduction Company, a Corporation, Helena Land and Improvement Company, a Corporation, Chicago Reduction Works, a Corporation, H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenec, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Strobel, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead,

Lind Warneck, Kate Cassidy, G. W. Jensen, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clark, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, and J. B. Maxfield,

Defendants. [123]

WILLIAM WARREN, John L. Bunnell, Hugh Rogan and Patrick Rogan, H. L. Cram, Martin Woldson, and T. W. Synott, S. M. Meadows, W. L. Milligan, Peter Hilger, W. G. Preuitt, A. P. Hanson, John Bower, and C. B. Kountz, Sophia Symes, Cathering Symes, John Symes, and George Symes, D. A. G. Floweree, Conrad-Stanford Company,

Intervenors.

BE IT REMEMBERED that this cause came on regularly to be heard in term and was submitted upon the testimony heretofore taken before a special examiner appointed by the Court and upon written

briefs and oral arguments of counsel for the respective parties; and thereupon, after due consideration thereof, it is ORDERED, ADJUDGED AND DECREED that the rights of the respective parties herein, complainant, defendants and intervenors, be and the same are hereby fixed, settled and determined in the amount, from the stream and of the date set opposite the names of said parties as follows, to wit:

Name	Amount in Miner's Inches	Stream from Which Taken	Date of Appropriation
Realty Company	100	Prickley Pear Creek	April 1, 1865
" "	190	Prickly Pear Creek	April 1, 1866
" "	167	Prickly Pear Creek	April 6, 1866.
Bower			
Kountz			
a Symes, Kathering Symes, n Symes and George nes, jointly	112.5	Prickly Pear Creek	October 15, 1866.
es E. Brown, successor to J. Hall,	60	Spring Creek	April 1, 1865
" "	40	Prickly Pear Creek	April 1, 1879

Name	Amount in Miner's Inches	Stream from Which Taken	Date of Appropriation
Bunnell	100	Prickly Pear Creek	April 1, 1866
C. Burgess,	67	Prickly Pear Creek	September 30, 1862.
ssor to Reynolds Prosser " " "	35	Prickly Pear Creek	January 1, 1869
	Also the absolute ownership of all developed bedrock waters conveyed in pipe system from Holmes Gulch, in Section 1, Township 9 North of Range 3 West; also all developed bedrock waters developed in McClellan Gulch, in Section 8, Township 9 North of Range 2 West.		
Carter and B. R. Young, tly,	15	Clark Creek	April 1, 1865
e Cockell	35	Prickly Pear Creek	April 1, 1865
ran-Stanford Company,	500	McClellan Creek	October 15, 1868
Cram,	50	Prickly Pear Creek	April 8, 1866
g Maria Erickson, successor to Martin Broen,	75	Beaver Creek	April 1, 1865
Fischer,	8	Dutchman Creek	April 1, 1870
G. Flowerree,	33	Prickly Pear Creek	May 1, 1865
" "	184	Prickly Pear Creek	April 6, 1866
el Foley	30	Lump Gulch Creek	May 1, 1895
an Freyler	10	Homestake Creek	April 1, 1872
	Also the right to the use of the waters of Homestake Creek during the irrigating season of each year commencing with June 1st, absolutely without regard to dates of appropriation.		
s Grossman, as successor to d Warneck	12	Little Buffalo Creek	October 7th, 1889
ccessor to Kate Cassidy	15	Big Buffalo Creek	April 1, 1896

Name	Amount in Miner's Inches	Stream from Which Taken	Date of Appropriatio[n]
Helena and Livingston Smelting and Reduction Company	80	Prickley Pear Creek	March 1, 1865
" " "	80	Prickly Pear Creek	May 1, 1866
R. S. Hale	400	Lump Gulch Creek	April 1, 1870
H. M. Hill	10	Clancy Creek	April 1, 1865
M. A. Haynes	60	Clancy Creek	April 1, 1865
A. P. Hansen	50	Prickly Pear Creek	November 24, 186[6]
" " "	67.5	Prickly Pear Creek	February 10, 1869
" " "	37.5	Prickly Pear Creek	October 15, 1866
Peter Hilger	67	Prickly Pear Creek	April 4, 1866
" "	100	Prickly Pear Creek	November 24, 1866
Harry Johnson	16	Lump Gulch Creek	April 1, 1892
P. A. Laroy, as successor to Marion D. Steves	22	Prickly Pear Creek	April 1, 1872
Mary B. Logan	27	Warm Springs Creek and Prickly Pear Creek	April 1, 1865
E. L. Marks	32	Lump Gulch Creek	April 1, 1865
" " "	16	Prickly Pear Creek	April 1, 1865
I. W. Marks	21	Prickly Pear Creek	April 1, 1865
" " "	8	Dutchman Creek	April 1, 1893
" " "	7	Dutchman Creek	April 1, 1894
S. M. Meadows	100	Prickly Pear Creek	April 8, 1866
W. L. Milligan	20	Prickly Pear Creek	March 1, 1865
" " "	20	Prickly Pear Creek	May 1, 1866
Harvey S. Mitchell, successor to James H. Mulhollen	22	Jackson Creek	April 1, 1887

Also, subject only to the right of Gerhard Thies as [h]inafter defined, all of the waters of Jackson Creek du[ring] the low-water season commencing June 1st, each year, [ab]solutely without regard to dates of appropriation.

[FSD]

Name	Amount in Miner's Inches	Stream from Which Taken	Date of Appropriation
A. H. Moulton	45	Prickly Pear Creek	April 1, 1865

[126]

[FSD]

Name	Amount in Miner's Inches	Stream from Which Taken	Date of Appropriation
Christian Nelson	55	Prickly Pear Creek	April 1, 1865
Christian Olsen, successor to Ole Noer,	25	Beaver Creek	May 1, 1880
William Ogilvie,	22	Warm Springs Creek	April 1, 1886
W. G. Preuitt	100.5	Prickly Pear Creek	April 20, 1866
" " "	50	Prickly Pear Creek	May 10, 1866
" " "	100	Prickly Pear Creek	April 1, 1867
Hugh Rogan and Patrick Rogan, jointly	76	Prickly Pear Creek	April 1, 1866
Catherine Sherman, Administratrix of the estate of William R. Sherman, deceased,	25	Prickly Pear Creek	January 13, 1896
" " "	10	Shingle Creek	April 13, 1892

Also, without regard to dates of appropriation, all of the waters of Shingle Creek during the low-water season, commencing June 1st each year; she is also awarded absolutely for her use at all times all of the waters of a certain spring, situated about 500 ft. southwest from the northwest corner of Sherman's ranch.

Name	Amount in Miner's Inches	Stream from Which Taken	Date of Appropriation
Asleck Slenes	22	Prickly Pear Creek	April 1, 1872
Robert Strobel	15	Clancy Creek	May 1, 1891
Dima S. A. Turner, Administratrix of the Estate of Davis C. Turner, deceased,	125	Jackson, Lost and Crystal Creeks, jointly,	August 1, 1866

And claimant is entitled to convey the water away from the water-shed of the streams named to the place where the same has been heretofore used, and may use the same both for mining and irrigation purposes; and after June 1st of each year claimant may during the remainder of the irrigating season take the amount of water, absolutely regardless of dates of appropriation. The Jackson Creek here referred to is the one from which claimant now diverts water, and is not the Jackson Creek referred to in connection with the Mitchell and Thies rights.

Name	Amount in Miner's Inches	Stream from Which Taken	Date of Appropriation
Gerhard Thies	16	Jackson Creek	April 1, 1884

After June 1st of each year, during the remainder of the irrigating season claimant is entitled to take the amount named, absolutely, regardless of dates of appropriation.

Name	Amount in Miner's Inches	Stream from Which Taken	Date of Appropriation
William Warren	98	Prickly Pear Creek	April 1, 1866
Christina Winslow	21	Dutchman Creek	April 1, 1870
Christina Wickersham	18	Spring Creek	April 1, 1865
Lawrence Wonderer	20	Prickly Pear Creek	April 1, 1865

Also, absolutely regardless of dates of appropriation, all of the waters of Strawberry Creek during the low-water season, commencing June 1st of each year.

[127]

Name	Amount in Miner's Inches	Stream from Which Taken	Date of Appropriation
Martin Woldson and T. W. Synott, jointly	134	Prickly Pear Creek	April 8, 1866
Charles B. Zastrow	20	Lump Gulch Creek	April 1, 1882

FOR MINING, MILLING, POWER, AND CONCENTRATING PURPOSES ONLY.

Name	Amount in Miner's Inches	Stream from Which Taken	Date of Appropriation
Harry C. Burgess, as successor to Reynolds Prosser	1,174	Prickly Pear Creek	May 1, 1889
	For power purposes only.		
Helena and Livingston Smelting and Reduction Company, a corporation,	3,000	Prickly Pear Creek	April 29, 1875
	For power purposes only.		
" " Also	25	Galconda Creek,	
" "	100	East Fork Creek,	
" "	50	West Fork Creek,	
" "	250	Beaver Creek,	
" "	100	Weimer Creek,	
" "	150	Anderson Gulch Creek,	
" "	250	Prickly Pear Creek,	
	All of date of		March 10, 1896
	And for power purposes only.		
" "	Also all of the waters of Spring Creek for power and concentrating purposes only,		April 1, 1868
Benjamin Z. Young and Joseph W. Young, jointly	150	McClellan	June 15, 1868
	For mining purposes only.		
T. H. Carter and B. R. Young, jointly	1,000	Prickly Pear Creek	June 1, 1863
	For mining and milling purposes only.		
James Clegg, Perry H. Park and Frank K. Turner, jointly	200	Prickly Pear Creek	April 1, 1865
	For mining purposes only.		

[128]

IT IS FURTHER ADJUDGED AND DECREED, that the water awarded for mining, milling, concentrating and power purposes only, or for any of said purposes, shall when diverted by said parties be returned to the stream from which it was diverted without any appreciable dim*uni*tion of quantity or deterioration in quality, to the end that agricultural rights in and to the waters of said stream shall not be substantially affected by reason of such uses, and the award for such purposes is made upon condition that the waters be so returned to the stream substantially undiminished in quantity and unimpaired in quality; provided, however, that the right awarded to Benjamin Z. Young and Joseph W. Young is excepted from this requi*rm*ent for the reason that said claimants necessarily convey the waters appropriated by them out of the water-shed of the stream from which the same is diverted.

IT IS FURTHER DECREED, that by the term "inch" of water, as the same is used in this decree, a miner's inch as defined by the statutes of Montana is intended; that is to say, one hundred inches of water, as the term is herein used, are equivalent to a flow at the rate of two and one-half cubic feet of water per second.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that each owner of a ditch and water right, as herein enumerated, shall construct and maintain a good and sufficient headgate and measuring-box at respective points of diversion of said ditch or ditches from said streams so that the water herein awarded shall and may be correctly

measured to each of said parties at the head of their respective ditch or ditches, where the same taps the stream from which the appropriation is made, and said water shall be measured to the parties at the head of the respective ditch or ditches of each party.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that each and all of the parties who have been awarded amounts of water shall have, and they are hereby given, the right to use the quantities of water so awarded to each party according to their respective priorities as herein fixed by this decree.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that each of [129] the parties herein awarded water rights, and his heirs, assigns, successors, personal representatives, tenants, sub-tenants, agents, attorneys, servants, and employees, and each and all of them, and any and all persons acting by, through or under them, or either of them, be and he is hereby perpetually enjoined and restrained from ever, at any time, or in anywise or manner, interfering with, molesting or intermeddling with any of the water rights of any and all other persons herein as the same are fixed, ascertained, adjudged and decreed by this decree.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED, that the owner or owners of the several ditches and water rights enumerated shall turn the water back into the contributing stream when such water is not actually being needed and used for some beneficial purpose, and there is hereby expressly reserved to this court

jurisdiction over each and all of the parties hereto, and their heirs, executors, administrators, successors and assigns, and of the several claims and water rights herein adjudicated for the purpose of enforcing this decree, and of appointing a water master or commissioner for carrying out the said decree, and also compelling a rotation of the use where such method of applying the water is necessary or desirable, and in case of the failure, refusal or neglect of any of the parties hereto, or their successors or assigns, to conform to and abide by the adjudication herein made to adjudge said party guilty of a contempt of this Court, and upon a proper showing thereof to the Court that such parties shall be subject to such pains and penalties as the Court may impose.

And it further appearing to the Court that upon the filing of the bill of complaint in this case a subpoena was duly issued and served on the defendants hereinafter named, and that no appearance has been entered on the part of said defendants, or demurrer, or plea, or answer or cross-complaint filed, and that the names of said defendants so failing to appear, demur, plead or answer are as follows, to wit: [130]

William Bevins, D. W. Beach, James Boone, Frank Bruce, Lizzie Bailey, Benjamin Borgstead, Chicago Reduction Works, I. B. Cutler, Frank Clark, James A. Carrier, S. I. Deal, Chas. A. Donnelly, E. C. Drosch, J. Ellis, H. W. Fry, F. M. French, H. L. Goudy, Helena Land and Improvement Company, Edward Heater, George Herbert, Otto Hofstead, Fred Hart, John Haab, J. W. Holt, E. J. Harris, C. W. Jensen, Joseph Kastner, Jacob

Kahler, Chas. Koegle, Peter Leary, Mary Leary, Robert Lynnes, H. E. Minter, John T. Murphy, Malcolm D. McRae, M. J. McDaniel, F. Mason, B. N. J. Miljouer, J. B. Maxfield, H. O. Nash, Anna E. Nash, John O'Keefe, Chas. O'Connell, John Pohl, Nellie R. Ricketts, Antone Semenec, Trued Swanson, A. L. Thorn, George Webster, and Benjamin Wahle.

And it further appearing to the Court that the following named parties were duly served with subpoenas and entered their appearance in this cause, but filed no cross-bill and set up no rights and offered no testimony in support of any rights in and to the waters involved herein, to wit: Big Indian Mining Company, John Merrigan, Margaret P. Roe, Gus Ruegg, Chris Robertson, and James Sweet.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED, that as to the said defendants who entered no appearance and failed to demur, plead, answer or file a cross-bill, and who failed, neglected and refused to introduce any testimony, or make proof of any rights in and to the waters of said streams, that the said bill of complaint be taken *pro confesso* as against each and all of said defendants, and it is hereby ORDERED, ADJUDGED AND DECREED, that each and all of said defendants are entitled to none of the waters of Prickly Pear Creek, or any of its tributaries, and that each and all of said named defendants be and they are hereby perpetually enjoined and restrained from in any manner and in anywise interfering with, molesting or intermeddling with any of the water rights of any and all of the other parties herein. [131]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that each of the parties hereto shall pay his own costs.

Dated, signed and passed this fifth day of October, A. D. 1911.

FRANK S. DIETRICH,

District Judge, Acting in the District of Montana, Under a Special Assignment. [132]

[Endorsed]: No. 668. In the Circuit Court of the United States, Ninth Circuit, District of Montana. Ames Realty Company, Plaintiff, vs. Big Indian Mining Company et al., Defendants. Decree. Filed and Entered Oct. 7, 1911. Geo. W. Sproule, Clerk. [133]

And thereafter, on October 16, 1911, an Order Correcting Clerical Errors in Decree was filed and entered herein, being in the words and figures following, to wit: [134]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY,

Plaintiff,

vs.

BIG INDIAN MINING COMPANY et al.,

Defendants.

Order Correcting Clerical Errors in Decree.

Attention having been called to certain clerical errors and omissions in the decree filed herein October 7th, 1911, it is ordered that such errors and

omissions be corrected and supplied as follows, to wit:

The amount awarded to Christian Nelson should be 55 instead of 33 inches, as appears in Memorandum of Decision filed herein August 7th, 1911;

And as appears in the same memorandum, Charles E. Brown, as the successor of J. J. Hall, should have 60 instead of 30 inches from Spring Creek;

And as appears from the Original Memorandum filed herein, the decree should award to A. H. Moulton 45 inches from Prickly Pear Creek of date, April 1st, 1865.

These corrections are accordingly made in the decree heretofore signed, and the Clerk of the court is directed to make the necessary additions and alterations in the record if the Decree has already been entered.

Dated this fourteenth day of October, 1911.

FRANK S. DIETRICH,

District Judge, Acting in the District of Montana Under Special Assignment. [135]

[Endorsed]: No. 668. In the Circuit Court of the United States, Ninth Circuit, District of Montana. Ames Realty Company, Plaintiff, vs. Big Indian Mining Company et al., Defendants. Order Correcting Clerical Errors in Decree. Filed Oct. 16, 1911. Geo. W. Sproule, Clerk. [136]

And thereafter, on April 10, 1912, an Assignment of Errors of defendant R. S. Hale was filed herein, being in the words and figures following, to wit: **[137]**

In the District Court of the United States for the District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation, Helena & Livingston Smelting and Reduction Company, a Corporation, Helena Land and Improvement Company, a Corporation, Chicago Reduction Works, a Corporation, H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenec, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Stroble, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead,

Lind Warneck, Kate Cassidy, C. W. Jenson, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Theis, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clarke, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, and J. B. Maxfield,

Defendants,

and

CONRAD-STANFORD COMPANY, a Corporation, D. A. G. Flowerree, William Warren, John L. Bunnell, Hugh Rogan, Patrick Rogan, W. L. Milligan, Peter Hilger, H. L. Cram, Martin Woldson, T. W. Synnott, S. M. Meadows, A. P. Hanson, John Bower, C. B. Kountz, Sophia Symes, Catherine Symes, John F. Symes, George G. Symes and W. G. Preuitt,

Intervenors. [138]

Assignment of Errors.

And now, on this the tenth day of April, A. D. 1912, came the defendant, Robert S. Hale, by his solicitor, Massena Bullard, and says that the decree entered in the above cause on the sixteenth day of October, 1911, is erroneous and unjust to the defendant, Robert S. Hale.

First. Because the Circuit Court of the United States for the Ninth Circuit, District of Montana, erred in not finding, adjudging and decreeing this defendant to be entitled to all the waters of Lump Gulch Creek and its tributaries, above the point of the diversion of the waters of said creek by the Park Ditch of this defendant, described in this defendant's cross-bill of complaint, as against all other parties,—complainant, defendants and intervenors,—to this action.

Second. Because the Circuit Court of the United States for the Ninth Circuit, District of Montana, erred in not embracing in its decree herein an injunction enjoining and restraining all other parties, —complainant, defendants and intervenors,—to this action, from in any way or manner, or to any extent, interfering with the use by this defendant, Robert S. Hale, of all the waters of Lump Gulch Creek and its tributaries, above the point of diversion of said waters by the Park Ditch of this defendant, described in this defendant's cross-bill of complaint.

Wherefore the above-named defendant, Robert S. Hale, prays that the said decree be reversed, and that a decree be entered herein finding, adjudging

and decreeing this defendant to be entitled to all the waters of Lump Gulch Creek and its tributaries, above the point of the diversion of the waters of said creek by the Park Ditch of this defendant, described in this defendant's cross-bill of complaint, as against all other parties,—complainant, defendants and intervenors,—to this action, and enjoining and restraining all other parties,—complainant, defendants and intervenors,—to this action, from in any way or manner, or to any extent, interfering with the use by this defendant, Robert S. Hale, of all the waters [139] of Lump Gulch Creek and its tributaries, above the point of diversion of said waters by the Park Ditch of this defendant, described in this defendant's cross-bill of complaint.

MASSENA BULLARD,
Solicitor for Defendant, Robert S. Hale.

[Indorsed]: Title of Court and Cause. Assignment of Errors. Filed April 10, 1912. Geo. W. Sproule, Clerk. [140]

And thereafter, on April 10, 1912, a Petition for Appeal and Order allowing same were filed and entered herein, being in the words and figures following, to wit: [141]

In the District Court of the United States for the District of Montana.

No. 668—IN EQUITY.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation, Helena & Livingston Smelting and Reduction Company, a Corporation, Helena Land and Improvement Company, a Corporation, Chicago Reduction Works, a Corporation, H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenec, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Stroble, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley,

R. S. Hale, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, C. W. Jenson, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clarke, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle and J. B. Maxfield,

Defendants,

and

CONRAD-STANFORD COMPANY, a Corporation, D. A. G. Flowerree, William Warren, John L. Bunnell, Hugh Rogan, Patrick Rogan, W. L. Milligan, Peter Hilger, H. L. Cram, Martin Woldson, T. W. Synnott, S. M. Meadows, A. P. Hanson, John Bower, C. B. Kountz, Sophia Symes, Catherine Symes, John F. Symes, George G. Symes and W. G. Preuitt,

Intervenors. [142]

Petition for Appeal.

Filed April 10, A. D. 1912, in the District Court of the United States for the District of Montana.

To the Hon. GEORGE M. BOURQUIN, District Judge of the District Court of the United States for the District of Montana:

The above-named defendant, Robert S. Hale, feeling himself aggrieved by the decree made and entered in this cause on the sixteenth day of October, A. D. 1911, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

MASSENA BULLARD,

Solicitor for Defendant and Appellant, Robert S. Hale.

Order Allowing Appeal, etc.

On this tenth day of April, 1912, came the above-named defendant, Robert S. Hale, by his solicitor, Massena Bullard, Esq., and moved the Court to be allowed an appeal from the decree of this court

herein rendered and entered on the —— day of October, 1911, to the United States Circuit Court of Appeals for the Ninth Circuit.

On the filing of the assignment of errors by the said defendant, **[143]** and appellant, the Court does hereby allow the said appeal, and does hereby fix the amount of the bond on the said appeal in the sum of Three Hundred Dollars, and the Court further orders that a certified transcript of the record, proceedings and papers upon which said decree appealed from was based or rendered, duly authenticated, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this tenth day of April, 1912.

By the Court,

GEO. M. BOURQUIN,

District Judge.

[Indorsed]: Title of Court and Cause. Petition for Appeal. Filed April 10, 1912. Geo. W. Sproule, Clerk. **[144]**

And thereafter, on April 10, 1912, a Bond on Appeal was approved and filed herein, being as follows, to wit: [145]

In the District Court of the United States for the District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation; Helena & Livingston Smelting and Reduction Company, a Corporation Helena Land and Improvement Company, a Corporation; Chicago Reduction Works, a Corporation; H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenec, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Stroble, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, C. W. Jenson, D. W.

Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clarke, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle and J. B. Maxfield,

Defendants,

and

CONRAD-STANFORD COMPANY, a Corporation, D. A. G. Flowerree, William Warren, John L. Bunnell, Hugh Rogan, Patrick Rogan, W. L. Milligan, Peter Hilger, H. L. Cram, Martin Woldson, T. W. Synnott, S. M. Meadows, A. P. Hanson, John Bower, C. B. Kountz, Sophia Symes, Catherine Symes, John F. Symes, George G. Symes and W. G. Preuitt,

Intervenors. [146]

Bond on Appeal.

Know All Men by These Presents: That we, Robert S. Hale, as principal, and United States Fidelity & Guaranty Company as surety, acknowledge ourselves to be jointly indebted to Ames Realty

Company, a corporation; Big Indian Mining Company, a corporation; Helena & Livingston Smelting and Reduction Company, a corporation; Helena Land and Improvement Company, a corporation; Chicago Reduction Works, a corporation; H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenec, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Stroble, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, C. W. Jenson, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clarke, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A.

Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, J. B. Maxfield, Conrad-Stanford Company, a corporation, D. A. G. Flowerree, William Warren, John L. Bunnell, Hugh Rogan, Patrick Rogan, W. L. Milligan, Peter Hilger, H. L. Cram, Martin Woldson, T. W. Synnott, S. M. Meadows, A. P. Hanson, John Bower, C. B. Kountz, Sophia Symes, Catherine Symes, John F. Symes, George G. Symes and W. G. Preuitt, appellees in the above cause, in the sum of Three Hundred Dollars, [147] conditioned that, whereas, on the sixteenth day of October, A. D. 1911, in the Circuit Court of the United States for the Ninth Circuit, District of Montana, in a suit depending in that court, wherein said Ames Realty Company was complainant, and the said Robert S. Hale and the said named appellees other than said Ames Realty Company were defendants or intervenors, numbered on the equity docket as 668, a decree was rendered, and the said Robert S. Hale having obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court to reverse the said decree, and a citation directed to the said appellees citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, in the State of California, on the eleventh day of May, A. D. 1912, next:

Now, if the said Robert S. Hale shall prosecute his appeal to effect and answer all costs if he fail to make his plea good, then the above obligation to be void;

else to remain in full force and virtue.

Dated April 10th, A. D. 1912.

ROBERT S. HALE.

UNITED STATES FIDELITY & GUARANTY COMPANY. [Seal]

By CLINTON O. PRICE,

Attorney in Fact.

Approved April 10, A. D. 1912.

GEO. M. BOURQUIN,

District Judge.

[Indorsed]: Title of Court and Cause. Bond on Appeal. Filed April 10, 1912. Geo. W. Sproule, Clerk. [148]

And thereafter, on April 10, 1912, a Praecipe for Transcript was filed herein, being in the words and figures following, to wit: [149]

In the District Court of the United States for the District of Montana.

IN EQUITY—No. 668.

AMES REALTY COMPANY, a Corporation,

Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation, et al.,

Defendants.

Praecipe for Transcript.

To the Clerk of said court:

Please prepare transcript on appeal in above-entitled action as follows:

Bill of complaint.

Subpoena.

Answer of defendant Hale.

Cross-bill of defendant Hale.

Transcript of testimony as hereinafter specified, the same being all the testimony necessary on the hearing of the appeal, to wit:

Stipulation, dated January 22, 1907.

Statement as to title of lands of defendant, Robert S. Hale, filed August 28, 1907.

Testimony of Robert S. Hale, page 964 to 972.

Testimony of John H. Shober, page 973 to 975.

Testimony of Robert S. Hale, page 976.

Deposition of Patrick Woods.

Deposition of D. A. G. Flowerree.

Deposition of William L. Steele.

Testimony of E. W. Payne beginning with the question, "Do you **[150]** remember a man by the name of A. M. Woolfolk?" on page 1662, and ending with the answer, "It may have been as late as 1870," line 3, page 1663.

Testimony of W. L. Millegan beginning with the question, "Did you know A. M. Woolfolk?" on page 1667, to and including the answer, "I don't think there was any signers when he came to my house. I lived right on the road," on page 1669.

Testimony of William Warren beginning with the question, "Did you know A. M. Woolfolk?" on page

1671, to and including the answer, "It seems like it. I have been in the valley a long time," on page 1672.

Testimony of Christmas G. Evans, page 1673 to 1674, and down to and including line 20 on page 1675, and that portion of page 1677 from and including the question, "Did you own a ranch in the Prickly Pear Valley in connection with your partner, Mr. Sanford," etc., to the close of the testimony of said witness on said page.

Testimony of H. L. Cram beginning with the question, "You have been sworn as a witness in this case before?" on page 1678, to and including the answer "Hardy Jones, J. H. were his initials," on same page.

Testimony of Hugh J. Rogan beginning with the question, "You are the same Hugh J. Rogan that has testified heretofore in this case, are you?" on page 1680, to and including the answer, "Well, the shortage started to come along about, say, 1895 or 1896, and from that on down," being the last answer on that page (1680).

Testimony of S. M. Meadows beginning with the question, "What is your full name, residence and occupation?" on page 1736, to and including the answer, "Twenty-six or seven years," on same page, and beginning with first question on page 1738 to the conclusion of the testimony of said witness on said page.

Opinions of the Court.

Decree as finally entered October 16, 1911.

Dated April 10, 1912.

MASSENA BULLARD,

Solicitor for Defendant and Appellant, Robert S. Hale.

[Indorsed]: Title of Court and Cause. Praecipe for Transcript. Filed April 10, 1912. Geo. W. Sproule, Clerk. [151]

And thereafter, on April 11, 1912, a Citation was issued herein, which is hereunto annexed and is in the words and figures following, to wit: [152]

In the District Court of the United States for the District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation; Helena & Livingston Smelting and Reduction Company, a Corporation; Helena Land and Improvement Company, a Corporation; Chicago Reduction Works, a Corporation; H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenec, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Stroble, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George

Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, C. W. Jenson, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clarke, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle and J. B. Maxfield,

Defendants,

and

CONRAD-STANFORD COMPANY, a Corporation, D. A. G. Flowerree, William Warren, John L. Bunnell, Hugh Rogan, Patrick Rogan, W. L. Milligan, Peter Hilger, H. L. Cram, Martin Woldson, T. W. Synnott, S. M. Meadows, A. P. Hanson, John Bower, C. B. Kountz, Sophia Symes, Catherine Symes, John F. Symes, George G. Symes and W. G. Preuitt,

Intervenors. [153]

Citation on Appeal.

United States of America to Ames Realty Company, a Corporation, Big Indian Mining Company, a Corporation, Helena & Livingston Smelting and Reduction Company, a Corporation, Helena Land & Improvement Company, a Corporation, Chicago Reduction Works, a Corporation, H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenec, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Stroble, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, C. W. Jenson, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Thies, Charles O'Connell, Martin

Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clarke, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, J. B. Maxfield, Conrad-Stanford Company, a Corporation, D. A. G. Flowerree, William Warren, John L. Bunnell, Hugh Rogan, Patrick Rogan, W. L. Milligan, Peter Hilger, H. L. Cram, Martin Woldson, T. W. Synnott, S. M. Meadows, A. P. Hanson, John Bower, C. B. Kountz, Sophia Symes, Catherine Symes, John F. Symes, George G. Symes and W. G. Preuitt:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, [154] to be held at the city of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States for the District of Montana, wherein Ames Realty Company, a Corporation, is complainant, and Big Indian Mining Company, a Corporation, Helena & Livingston Smelting and Reduction Company, a corporation, Helena Land and Improvement Company, a corporation, Chicago Reduction Works, a Corporation, H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian

Nelson, Antone Semenec, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Stroble, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, C. W. Jenson, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clarke, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle and J. B. Maxfield are defendants, and Conrad-Stanford Company, a Corporation, D. A. G. Flowerree, William Warren, John L. Bunnell, Hugh Rogan, Patrick Rogan, W. L. Milligan, Peter Hilger, H. L. Cram, Martin Woldson, T. W. Synnott, S. M. Meadows, A. P. Hanson, John Bower, C. B. Kountz, Sophia Symes, [155] Catherine Symes, John F. Symes, George G. Symes and W. G. Preuitt are intervenors,

to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Hon. GEORGE M. BOURQUIN, Judge of the District Court of the United States for the District of Montana, this eleventh day of April, A. D. 1912.

GEO. M. BOURQUIN,
District Judge.

Service of foregoing citation accepted and copy received this eleventh day of April, 1912.

O. W. McCONNELL,
Solicitor for Complainant.

SHOBER & RASCH, and
CARL RASCH,
Solicitors for Certain Defendants.

M. S. GUNN,
Solicitor for Certain Defendants.

IRA T. WIGHT,
Solicitor for Certain Defendants.

H. S. HEPNER,
Solicitor for Certain Defendants.

H. G. & S. H. McINTIRE,
C. A. SPAULDING,
Solicitors for Certain Defendants.

GALEN & METTLER,
Solicitors for Certain Defendants.

EDWARD HORSKY,
Solicitor for Certain Defendants.

O. W. McCONNELL,
Solicitor for Certain Intervenors.

W. D. TIPTON,

Solicitor for Certain Intervenors.

A. P. HEYWOOD,

Solicitor for Certain Defendants and Intervenors.

A. I. LOEB &

JAMES A. WALSH,

Solicitors for Harry C. Boyers & Nettie Burgess.

Service of citation on appeal in the case of Ames Realty Company, a Corporation, vs. Big Indian Mining Company et al., in the District Court of the United States for the District of Montana, accepted and copy of said citation received this fifteenth day of April, 1912.

D. M. KELLY,

Solicitor for Certain Defendants. [156]

[Endorsed]: No. 668. Ames Realty Company, a Corporation, Complainant, vs. Big Indian Mining Company, a Corporation, et al., Defendants. Citation on Appeal. Filed and entered Apr. 22, 1912. Geo. W. Sproule, Clerk. [157]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 158 pages, numbered consecutively from 1 to 158, inclusive, is a true and correct transcript of those por-

tions of the pleadings, process, orders and testimony, and of the decree and opinions of the court, and all other proceedings had in said cause, specified in the praecipe for transcript filed herein, as appears from the original files and records of said court in my possession as such Clerk; and I further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of One Hundred Twenty-one 10/100 Dollars ($121.10/100), and that the same have been paid by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Helena, Montana, this 2d day of May, A. D. 1912.

[Seal] GEO. W. SPROULE,

Clerk. [158]

[Endorsed]: No. 2144. United States Circuit Court of Appeals for the Ninth Circuit. Robert S. Hale, Appellant, vs. Ames Realty Company, a Corporation, et al., Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Received May 7, 1912.

F. D. MONCKTON,

Clerk.

Filed May 18, 1912.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2145 2

United States
Circuit Court of Appeals
For the Ninth Circuit.

H. V. MOREHOUSE and I. S. THOMPSON,
Plaintiffs in Error,

vs.

GIANT POWDER COMPANY, Consolidated, a Corporation, PACIFIC HARDWARE AND STEEL COMPANY, a Corporation, and J. A. FOLGER & COMPANY, a Corporation,
Defendants in Error.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, Bankrupt.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Nevada.

FILED
JUL 1 1 1912

FIILMER BROS. CO. PRINT, 330 JACKSON ST. S. F., CAL.

No. 2145

United States
Circuit Court of Appeals
For the Ninth Circuit.

H. V. MOREHOUSE and I. S. THOMPSON,
Plaintiffs in Error,

vs.

GIANT POWDER COMPANY, Consolidated, a Corporation, PACIFIC HARDWARE AND STEEL COMPANY, a Corporation, and J. A. FOLGER & COMPANY, a Corporation,
Defendants in Error.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, Bankrupt.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Nevada.

FILMER BROS. CO. PRINT, 330 JACKSON ST. S. F., CAL.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys of Record.]

I. S. THOMPSON and H. V. MOREHOUSE,
Attorneys for Plaintiffs in Error.

J. L. KENNEDY, E. E. ROBERTS, DETCH & CARNEY,
Attorneys for Petitioning Creditors.

[Petition in Bankruptcy.]

In the District Court of the United States in and for the District of Nevada.

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

To the Honorable the District Court of the United States in and for the District of Nevada:

The petition of The Giant Powder Company, Consolidated, a corporation, organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco, State of California; and Pacific Hardware and Steel Company, a corporation, organized and existing under and by virtue of the laws of the State of New Jersey, and having its principal place of business in the City and County of San Francisco, State of California; and J. A. Folger and Company, a corporation, organized and existing under and by virtue of the laws of the State of California, and having its principal

place of business in the City and County of San Francisco, State of California, respectfully shows: That at all the times hereinafter mentioned the respondent above named, Exploration Mercantile Company, a corporation, has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, with its principal place of business at Goldfield, County of Esmeralda, State of Nevada.

That said respondent, Exploration Mercantile Company, has for the greater portion of six months next preceding the date of the filing of this petition had its principal place of business at Goldfield, County of Esmeralda, State of Nevada, and that at all said times it has been and now is engaged principally in trading and mercantile pursuits. That said Exploration Mercantile Company, a corporation, owes debts to the amount of One Thousand Dollars. That your petitioners are creditors of said Exploration Mercantile Company, a corporation, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of Five Hundred Dollars. That the nature and amount of your petitioners' claims are as follows: [1*]

An open account for goods sold and delivered by said The Giant Powder Company, Consolidated, a corporation, to said Exploration Mercantile Company, a corporation, within two years last past, in the sum of $360.45; and a promissory note given by said Exploration Mercantile Company, a corpora-

*Page-number appearing at foot of page of original certified Record.

tion, to said The Giant Powder Company, Consolidated, a corporation, dated March 12, 1908, payable one day after date with interest at eight per cent per annum, in the sum of $15,888.72, which said note was given in consideration of goods sold and delivered prior to said 12th day of March, 1908.

An open account for goods sold and delivered by said Pacific Hardware and Steel Company, a corporation, to said Exploration Mercantile Company, a corporation, within two years last past, in the sum of $376.43; and a promissory note given by said Exploration Mercantile Company, a corporation, to said Pacific Hardware and Steel Company, a corporation, dated March 2, 1908, payable one day after date with interest at eight per cent per annum, in the sum of $15,035.56, which said note was given in consideration of goods sold and delivered prior to said 2d day of March, 1908.

An open account for goods sold and delivered by said J. A. Folger and Company, a corporation, to said Exploration Mercantile Company, a corporation, within two years last past, in the sum of $360.63; and a promissory note given by said Exploration Mercantile Company, a corporation, to said J. A. Folger and Company, a corporation, dated March 16, 1908, payable on demand with interest at eight per cent per annum, in the sum of $2,033.16, which said note was given in consideration of goods sold and delivered prior to said 16th day of March, 1908.

And your petitioners further represent that said Exploration Mercantile Company, a corporation, is

insolvent, and that within four months next preceding the date of this petition the said Exploration Mercantile Company, a corporation, committed an act of bankruptcy, in that it did heretofore, to wit, on the sixth day of August, A. D. 1908, being insolvent, apply for a receiver for its property; that is to say,

On the said sixth day of August, A. D. 1908, W. C. Stone, the president of said Exploration Mercantile Company, a corporation, filed his petition in the District Court of the First Judicial District of the State of Nevada, [2] in and for the County of Esmeralda, entitled "W. C. Stone, Plaintiff, vs. Exploration Mercantile Company, Defendant," and being number 2792 of the files of said court, wherein he alleged that the assets of said corporation were in danger of waste through attachment and litigation, and prayed that a receiver be appointed for its property and that the corporation be dissolved; and on the same day C. E. Wylie the manager and a director of said Exploration Mercantile Company, a corporation, filed in said last above mentioned cause his application on behalf of said Exploration Mercantile Company, a corporation, as follows, to wit:

"In the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda.

W. C. STONE,

Plaintiff,

vs.

EXPLORATION MERCANTILE COMPANY (a Corporation),

Defendant.

Now comes C. E. Wylie, Manager and one of the Directors of the above-named defendant, and enters the appearance of the said defendant in the above-entitled cause, and asks the above-entitled court to appoint as receiver of said defendant, C. E. Wylie, the undersigned, one of the directors of said corporation. C. E. Wylie, Manager and Director of the Exploration Mercantile Company."

And that on said 6th day of August, A. D. 1908, the said C. E. Wylie did in writing, file in said cause, admit and accept service of the summons issued in said cause, for said corporation. And your petitioners further represent that said District Court of the First Judicial District of the State of Nevada did on said sixth day of August, 1908, make its order appointing said C. E. Wylie receiver of the property of said Exploration Mercantile Company, a corporation, that on or about the 7th day of August, 1908, said C. E. Wylie qualified as such receiver and thence hitherto has continued to act and has been in possession of said property. Wherefore your peti-

tioners pray that service of this petition, with a subpoena, may be made upon Exploration Mercantile Company, a corporation, as provided in the acts of Congress relating to bankruptcy, and that it may be adjudged bankrupt within the purview of said acts.

THE GIANT POWDER COMPANY, CONSOLIDATED.

By C. C. QUINN,

Secretary of said Corporation.

E. E. ROBERTS,

J. L. KENNEDY and

ROBERT RICHARDS,

Attorneys for Petitioners.

PACIFIC HARDWARE AND STEEL COMPANY.

By W. H. SCOTT,

Assistant Secretary of said Corporation.

J. A. FOLGER & COMPANY,

By R. R. VAIL,

Secretary of said Corporation. [3]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

C. C. Quinn, R. R. Vail and W. H. Scott, do hereby make solemn oath that said C. C. Quinn is Secretary of The Giant Powder Company, Consolidated, a corporation, one of the petitioners herein; that said W. H. Scott is assistant Secretary of Pacific Hardware and Steel Company, a corporation, one of the petitioners herein; that said R. R. Vail is Secretary of J. A. Folger and Company, a corporation, one of

the petitioners herein; and that the statements contained in the foregoing petition subscribed by them are true according to the best of their knowledge, information and belief.

C. C. QUINN,
W. H. SCOTT.
R. R. VAIL.

Before me, R. B. Treat, a Notary Public in and for the City and County of San Francisco, State of California, this 5th day of September, A. D. 1908.

[Seal] R. B. TREAT,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 103. In the District Court of the United States for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, an Alleged Bankrupt. In Bankruptcy. Creditors' Petition. Filed September 12, 1908, at 10 o'clock and 10 minutes A. M. T. J. Edwards, Clerk. E. E. Roberts, J. L. Kennedy and Robert Richards, Attorneys for Petitioners, Carson, Nevada.

[Petition for Injunction.]

In the District Court of the United States in and for the District of Nevada.

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

Respectfully represents The Giant Powder Company, Consolidated, a corporation, Pacific Hardware and Steel Company, a corporation, and J. A. Folger and Company, a corporation, that they are the petitioners which have filed their petition in the above-entitled matter praying that the said Exploration Mercantile Company, a corporation, be adjudicated a bankrupt. That said Exploration Mercantile Company, a corporation, has a stock of goods, wares and merchandise consisting of hardware, groceries and other merchandise in Goldfield, [4] District of Nevada, a stock of similar goods at the town of Jamestown in said District, and another stock of similar merchandise at the town of Hornsilver in said District. That W. C. Stone, the President of said Exploration Mercantile Company, has stated to petitioners that said corporation has been doing business at a considerable loss during the last four or five months next prior to the appointment of the receiver mentioned in the petition on file herein.

That on or about the first day of August, 1908, said corporation advertised a sale of said merchandise at reduced prices, and said receiver C. E. Wylie has informed your petitioners that said corporation for some days prior to the appointment of said receiver, and said receiver since that time has been selling parts of said merchandise at greatly reduced prices. That said receiver has been procuring new merchandise and conducting the business and selling large quantities of goods. That in the petition filed in the District Court of the First Judicial District

of the State of Nevada, mentioned in the petition on file herein, the said W. C. Stone prayed that the receiver take charge of the affairs of said corporation, and conduct and manage the same with a view to its dissolution, and in the order made pursuant to said petition the said District Court ordered that the said corporation be, as far as the proceedings therein are concerned, dissolved, and that C. E. Wylie be appointed receiver with full power to take charge of the assets, control and business of the Exploration Mercantile Company.

That said petitioners are fearful that said goods, wares and merchandise will be dissipated and that they will sustain irreparable injury unless an injunction or restraining order be entered herein enjoining or restraining the said Exploration Mercantile Company, a corporation, and said C. E. Wylie, receiver, as aforesaid, from selling or otherwise disposing of any of the property of said alleged bankrupt.

The premises considered, they pray for an order enjoining and restraining the said Exploration Mercantile Company, a corporation, and C. E. Wylie, receiver as aforesaid, from disposing of said property, goods, wares and merchandise, or any part thereof.

E. E. ROBERTS,
ROBERT RICHARDS,
J. L. KENNEDY,
Attys. for Petitioners. [5]

J. L. Kennedy says that he is one of the attorneys of record for the petitioners hereinbefore named, and that the statements contained in the foregoing

petition are true, as he believes; that the reason this verification is not made by the petitioners is that each of the petitioners is a corporation duly organized and existing and having its principal place of business in the City and County of San Francisco, State of California, more than one hundred miles from the City of Carson, and that the deponent has been duly authorized to make this verification.

J. L. KENNEDY.

Subscribed and sworn to before me by J. L. Kennedy this 12th day of September, A. D. 1908.

[Seal] J. POUJADE,

Notary Public within and for the County of Ormsby, State of Nevada.

[Endorsed]: No. 103. In the District Court of the United States in and for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, an Alleged Bankrupt. Petition for Injunction. Filed September 12, 1908, at 10 o'clock and 10 Minutes A. M. T. J. Edwards, Clerk. E. E. Roberts, J. L. Kennedy and Robert Richards, Attorneys for Petitioners, Carson.

[Petition to Stay Proceedings.]

In the District Court of the United States in and for the District of Nevada.

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

Your petitioners, The Giant Powder Company, Consolidated, The Pacific Hardware and Steel Company and J. A. Folger and Company, respectfully show: That on the —— day of September, 1908, your petitioners filed in said court their petition praying that said Exploration Mercantile Company be adjudged a bankrupt. That at the time of the filing of said petition a suit was pending in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, entitled "W. C. Stone, Plaintiff, vs. Exploration Mercantile Company, Defendant," and being number 2792 of the files of said court; and that in said suit such proceedings were had that one C. E. Wylie, a director of said alleged bankrupt, Exploration Mercantile Company, was appointed the receiver with full power [6] to take charge of the assets, control and business of said Exploration Mercantile Company.

That prior to the filing of said petition said C. E. Wylie qualified and thence hitherto continued to be and now is the qualified and acting receiver of the assets, control and business of said alleged bankrupt, and said C. E. Wylie at all said time has been and now is continuing and conducting the business of said alleged bankrupt.

That if said suit is not stayed, great injury will be done to your petitioners and the estate of the Exploration Mercantile Company, a corporation, to be administered in bankruptcy herein.

Wherefore, your petitioners pray that further proceedings in said suit may be stayed pursuant to the

bankruptcy laws of the United States in such cases made and provided, and that an injunction may be issued out of this Honorable Court directed to the said W. C. Stone, C. E. Wylie and Exploration Mercantile Company, restraining them, their agents, servants, attorneys and counselors, from further prosecuting said suit in said court, and for such other and further relief as to the Court may seem just.

E. E. ROBERTS,
J. L. KENNEDY,
ROBERT RICHARDS,
Attys. for Petitioners.

State of Nevada,
County of Ormsby,—ss.

I, J. L. Kennedy, one of the attorneys for the petitioners mentioned in the foregoing petition, do hereby make solemn oath that the statements of fact contained therein are true to the best of my knowledge, information and belief; that the reason this verification is not made by the petitioners is that each of the petitioners is a corporation duly organized and existing and having its principal place of business in the City and County of San Francisco, State of California, more than one hundred miles from the City of Carson, and that the deponent has been duly authorized to make this verification.

J. L. KENNEDY.

Subscribed and sworn to before me this 12th day of September, A. D. 1908.

[Seal] J. POUJADE,
Notary Public Within and for the County of Ormsby, State of Nevada. [7]

[Endorsed]: No. 103. In the District Court of the United States in and for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, an Alleged Bankrupt. In Bankruptcy. Petition for Injunction to Stay Suit. Filed September 12, 1908, at 10 o'clock and 10 Minutes A. M. T. J. Edwards, Clerk. E. E. Roberts and J. L. Kennedy, Robert Richards, Attorneys for Petitioners, Carson, Nevada.

[Motion for Rule to Show Cause, and Affidavit of P. F. Carney.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

Now come the undersigned creditors herein and move the Court that a rule issue herein, directing W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse to appear in this court at Carson City, County of Ormsby, State of Nevada, on the 21st day of July, 1909, at 10 o'clock A. M., and show cause why an attachment for contempt should not issue against them for disobedience of the orders of this Court issued herein, copies of which orders and the return of service thereof by the United States Marshal are set forth in the hereinafter mentioned affidavit. Said motion being sup-

ported by the affidavit of P. F. Carney, and made a part hereof.

THE GIANT POWDER COMPANY, CONSOLIDATED.

PACIFIC HARDWARE AND STEEL COMPANY.

J. A. FOLGER & COMPANY.

By DETCH & CARNEY,
ROBERTS, RICHARDS & FOWLER,
J. L. KENNEDY,
Their Attorneys.

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

United States of America,
State of Nevada,
County of Ormsby,—ss.

P. F. Carney, being duly sworn on oath, [8] deposes and says: That he is a regular practicing attorney residing at Goldfield, Esmeralda County, Nevada, and that he is one of the attorneys of record for the petitioning creditors in the above-entitled cause.

That on the 12th day of September, 1908, the said petitioning creditors filed their petitions in the above-entitled court praying that the Exploration Mercantile Company, a corporation, be adjudged bankrupt within the purview of the acts of Congress relating to bankruptcy; that said Exploration Mercantile

Company and C. E. Wylie, its receiver, be enjoined and restrained from disposing of its property, goods, wares and merchandise, or any part thereof; and that further proceedings in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, in the cause entitled "W. C. Stone, Plaintiff, vs. Exploration Mercantile Company, Defendant," be stayed pursuant to the bankruptcy laws of the United States in such cases made and provided, and that an injunction be issued out of this Honorable Court directed to the said W. C. Stone, C. E. Wylie, and Exploration Mercantile Company, restraining them, their agents, servants, attorneys and counselors, from further prosecuting said suit in said State Court.

That thereupon and on said 12th day of September, 1908, this Honorable Court made its two certain orders, copies of which are as follows, to wit:

"In the District Court of the United States, in and for the District of Nevada.

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

United States of America,
District of Nevada,—ss.

The President of the United States of America, to W. C. Stone, C. E. Wylie, and Exploration Mercantile Company, a Corporation, Greeting:

Where as a petition has been filed on the bankruptcy side of the District Court of the United States

for the District of Nevada, praying for an injunction to restrain the prosecution of a certain suit pending in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, in which said W. C. Stone, is plaintiff, and Exploration Mercantile Company is defendant, and has obtained an allowance for an injunction, as prayed for in said petition from the District Court of the United States, for the District of Nevada:

Now, therefore, we, having regard to the matters in said petition contained, do hereby command and strictly enjoin you, the said W. C. Stone, C. E. Wylie, and Exploration Mercantile Company, a corporation, or either of you, and each of your agents, servants, attorneys or counsellors, from further prosecuting said suit in said Court, and from taking any further step or proceeding in said action or suit now pending, as aforesaid, which commands and injunction you are respectively required to observe until our [9] said District Court shall make further order in the premises. Hereof fail not, under the penalty of the law thence ensuing.

Witness, the Honorable E. S. FARRINGTON, District Judge of the United States for the District of Nevada, this 12th day of September, A. D. 1908, and in the hundred and thirty-third of the Independence of the United States of America.

[Seal] T. J. EDWARDS,

Clerk of said Court.

In the District Court of the United States, in and for the District of Nevada.

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

Respectfully represents The Giant Powder Company, Consolidated, a corporation, Pacific Hardware and Steel Company, a corporation, and J. A. Folger and Company, a corporation, that they are the petitioners which have filed their petition in the above-entitled matter praying that the said Exploration Mercantile Company, a corporation, be adjudicated a bankrupt. That said Exploration Mercantile Company, a corporation, has a stock of goods, wares, and merchandise consisting of hardware, groceries and other merchandise in Goldfield, District of Nevada, a stock of similar goods at the town of Jamestown, in said District, and another stock of similar merchandise at the town of Hornsilver, in said District.

That W. C. Stone, the president of said Exploration Mercantile Company, has stated to petitioners that said corporation has been doing business at a considerable loss during the last four or five months next prior to the appointment of the receiver mentioned in the petition on file herein.

That on or about the first day of August, 1908, said corporation advertised a sale of said merchandise at reduced prices and said receiver, C. E. Wylie, has informed your petitioners that said corporation for

some days prior to the appointment of said receiver, and said receiver since that time, has been selling parts of said merchandise at greatly reduced prices.

That said receiver has been procuring new merchandise and conducting the business and selling large quantities of goods.

That in the petition filed in the District Court of the First Judicial District of the State of Nevada, mentioned in the petition on file herein, the said W. C. Stone prayed that receiver take charge of the affairs of said corporation, and conduct and manage the same with a view to its dissolution, and in the order made pursuant to said petition the said District Court ordered that the said corporation be, as far as the proceedings therein are concerned, dissolved, and that C. E. Wylie be appointed receiver with full power to take charge of the assets, control and business of the Exploration Mercantile Company.

That said petitioners are fearful that said goods, wares and mechandise will be dissipated and that they will sustain irreparable injury unless an injunction or restraining order be entered herein enjoining or restraining the said Exploration Mercantile Company, a corporation, and said C. E. Wylie, receiver, as aforesaid, from selling or otherwise disposing of any of the property of said alleged bankrupt.

The premises considered, they pray for an order enjoining and restraining the said Exploration Mercantile Company, a corporation, and C. E. Wylie, receiver as aforesaid, from disposing of said prop-

erty, goods, wares and merchandise, or any part thereof.

E. E. ROBERTS,
ROBERT RICHARDS,
J. L. KENNEDY,
Attys. for Petitioners.

J. L. Kennedy says that he is one of the attorneys of record for the petitioners hereinbefore named, and that the statements contained in the foregoing petition are true, as he believes; that the reason this verification is not made by the petitioners is that each of the petitioners is a corporation duly organized and existing and having its principal place of business in the City and County of San Francisco, State of California, [10] more than one hundred miles from the City of Carson, and that the deponent has been duly authorized to make this verification.

J. L. KENNEDY.

Subscribed and sworn to before me by J. L. Kennedy, this —— day of September, A. D. 1908.

[Seal] J. POUJADE,
Notary Public Within and for the County of Ormsby, State of Nevada."

In the District Court of the United States, in and for the District of Nevada.

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

And now, this 12th day of September, 1908, on motion of said attorneys, it appearing to the Court that there is danger of irreparable injury to the creditors of the said debtor, unless the act sought to be enjoined is at once restrained, it is ordered that the above motion be heard at a session of said court, to be held at the City of Carson, on the 18th day of September, A. D. 1908, at 10 o'clock A. M.; and it is further ordered that, until the decision of this court upon the said motion, the said parties against whom an injunction is prayed be restrained, and they are hereby commanded, under such penalties as are inflicted by the laws of the United States, to abstain from the sale of, or in any other manner whatever disposing of, the property or estate or any part thereof of the above named Exploration Mercantile Company, a corporation.

E. S. FARRINGTON,
Judge.

That thereafter said orders were placed in the hands of the United States Marshal for the District of Nevada for service and were duly and regularly served by him at the times and in the manner set forth in said Marshal's return annexed to the writ of subpoena on file herein, a copy of which said return is as follows, to wit:

"United States of America,
District of Nevada,—ss.

I hereby certify and return that I received the within writ together with a certified copy of the Creditor's complaint, and that I served the same on W. C. Stone, personally, as the President of the Explora-

tion Mercantile Company, at Goldfield, in said District, on the 14th day of Sepember, 1908. I further certify and return that I served W. C. Stone, personally, as the President of the Exploration Mercantile Company, with an Order to Show Cause, a Temporary Restraining Order, and an Injunction to Stay Suit, at Goldfield, in said District, on the 14th day of September, 1908. I also certify and return that I served C. E. Wylie, personally, as the Receiver in charge of the Exploration Mercantile Company, with an Injunction to Stay Suit and a Temporary Restraining Order, at Goldfield, in said district, on the 14th day of September, 1908.

ROBERT GRIMMON,
U. S. Marshal.
By H. R. Mack,
Deputy.

MARSHAL'S EXPENSES AND FEES.

7 services	$ 28.00
Mileage on two writs, 345 miles each at 12¢	82.80
	$110.80."

[11]

That on said 14th day of September, 1908, service of said orders was admitted in writing, a copy of which writing is as follows, to wit:

"Service of the within subpoena, petition in bankruptcy, order to show cause, temporary restraining

order, and the injunction to stay suit, this 14th day of September, 1908.

EXPLORATION MERCANTILE CO.
By W. C. STONE.
C. E. WYLIE,
Receiver."

That said two orders have been at all times since their issuance and now are in full force and effect, and have not been modified. That at all times herein mentioned C. E. Wylie has been the vice-president of said Exploration Mercantile Company and the Receiver thereof appointed by said State Court; that said C. E. Wylie has wilfully and contemptuously violated said orders, in this, that he did as such Receiver, after the service of said orders upon him collect moneys due said Exploration Mercantile Company at divers times between the 30th day of September, 1908, and the 27th day of April, 1909, in sums aggregating in excess of $3,000.00.

That said C. E. Wylie has further wilfully and contemptuously violated said orders in this, that he did as such Receiver, after the service of said orders upon him, wilfully and contemptuously pay out at divers times between the 30th day of September, 1908, and the 30th day of April, 1909, sums of money, the property of said Exploration Mercantile Company, aggregating more than $10,000.00.

That said C. E. Wylie has further wilfully and contemptuously violated said orders in this, that he has appropriated, after the service of said orders upon him, to his own use, out of the moneys of said Exploration Mercantile Company, sums aggregating

more than $1,000.00.

That said C. E. Wylie has further wilfully and contemptuously violated said orders in this, that he did, after the service of said orders upon him, wilfully and contemptuously ask the said State Court on the 10th day of February, 1909, for an order permitting him as such Receiver, to sell the property of said Exploration Mercantile Company.

That Walter C. Stone has at all times herein mentioned been the President of said Exploration Mercantile Company; that said Walter C. Stone has wilfully and contemptuously violated said orders, in this, that he has, after service of said orders upon him, wilfully and contemptuously demanded and [12] received from said C. E. Wylie the following sums of money, the property of said Exploration Mercantile Company, to wit:

On October 7, 1908, the sum of...	$ 500.00
On November 6, 1908, the sum of..	500.00
On December 7, 1908, the sum of..	1500.00
On January 19, 1908, the sum of..	500.00
Total....................	$ 3000.00

That Frank G. Hobbs has at all times mentioned been the Secretary of said Exploration Mercantile Company; that said Frank G. Hobbs has wilfully and contemptuously violated said orders in this, that he has after having actual notice and knowledge of said orders and the contents thereof assisted said C. E. Wylie in the collection of the aforesaid sums of money herein alleged to have been collected by said C. E. Wylie, and has been employed by said C. E.

Wylie, as Receiver, and has received from said Receiver at divers times, after having had notice and knowledge of said orders, and between the 1st day of October, 1908, and the 30th day of April, 1909, sums aggregating more than $700.00.

That I. S. Thompson has at all times herein mentioned been an attorney at law and a member of the law firm of Thompson, Morehouse & Thompson, and that said law firm has been at all said times the attorneys for said C. E. Wylie, Receiver, and for Walter C. Stone. That said I. S. Thompson, after having notice and knowledge of said orders and of their contents, has wilfully and contemptuously violater said orders in this, that he has counselled and advised said Walter C. Stone to demand and receive from said C. E. Wylie the sums of money hereinbefore alleged to have been paid by said C. E. Wylie to said Walter C. Stone, and counselled and advised said C. E. Wylie to pay said sums to said Walter C. Stone; and that said I. S. Thompson did further wilfully and contemptuously demand and receive from said C. E. Wylie on the 7th day of December, 1908, the sum of $1,000.00, as an attorneys' fee.

That H. V. Morehouse has at all times herein mentioned been an attorney at law and a member of the law firm of Thompson, Morehouse & Thompson, and that said law firm has been at all said times the attorneys for said C. E. Wylie, Receiver, and for Walter C. Stone; that after having knowledge and notice of said orders and their contents said H. V. Morehouse has wilfully and contemptuously violated said orders in this, that he has counselled and [13]

advised said C. E. Wylie to collect said sums of money collected by him as aforesaid; he has asked the said State Court on behalf of said C. E. Wylie, to make the aforesaid order of sale of the property of said Exploration Mercantile Company, and, in conjunction with I. S. Thompson, another member of said law firm, has demanded and received from said C. E. Wylie, on the 7th day of December, 1908, the sum of $1,000.00 as an attorneys' fee; that said H. V. Morehouse, after having said notice and knowledge of said orders and their contents, advised the Honorable Peter J. Somers, Judge of the District Court of the Seventh Judicial District of the State of Nevada, in and for Esmeralda County, in a proceeding before said court in the case of W. C. Stone vs. Exploration Mercantile Company, to pay no attention to the action of the Federal Court. And further affiant saith not.

P. F. CARNEY.

Subscribed and sworn to before me this 9th day of July, A. D. 1909.

T. J. EDWARDS,

Clerk of the United States District Court, in and for the District of Nevada.

[Indorsed]: No. 103. In the District Court of the United States for the District of Nevada. In the Matter of Exploration Mercantile Co., a Corporation, an Alleged Bankrupt. Motion and Affidavit. Filed July 9th, 1909, at 2:30 o'clock P. M. T. J. Edwards, Clerk.

[Affidavit on Dissolution of Injunction and Stay of Proceedings.]

In the District Court of the United States for the District of Nevada.

No. 103.

In the Matter of EXPLORATION MERCANTILE COMPANY (a Corporation), an Alleged Bankrupt.

Comes now the Exploration Mercantile Company, and, appearing to the order to show cause or temporary restraining order issued herein, says that said Exploration Mercantile Company is not insolvent, but that its assets at a fair valuation is fully $95,000.00, while its liabilities are $74,664.36; that it is true that for several months there has been a general depression in business at Goldfield, County of Esmeralda, State of Nevada, but that it is now true that said Exploration Mercantile Company has been [14] doing business at a loss, and that what said W. C. Stone, President of said Company meant in saying that said company had been doing business at a considerable loss was, that the business of said company, compared with its business on former times, was less, and not that the said company was losing money or selling goods, wares and merchandise at a loss. It is true also that on or about the 1st day of August, 1908, it advertised a sale of goods, wares and merchandise at reduced selling prices, but that in making such sales, said Exploration Mercantile Company was only meeting the present business conditions surrounding all business

in Goldfield, at that time, and that such advertised sale was not made with the intent or purpose of selling goods, wares and merchandise at a loss to said Exploration Mercantile Company, but simply to induce and procure quick sale, and rapid transactions, and make for the time smaller profits; but by having larger sales, to reap advantage, and such action was simply a good and prudent act, and in no way injurious to any creditor of said Exploration Mercantile Company, but an act leading to the advantage of the business of said Exploration Mercantile Company, which, upon the slightest examination, any business man acquainted with the conditions surrounding business in Goldfield, would approve; that reduced prices and quick sales is a matter of business judgment and dependent upon a knowledge of business conditions in Goldfield, and that in no instance have sales been made unprofitable to said Exploration Mercantile Company, or to the injury of its creditors; that it is true that under a complaint filed by W. C. Stone, a stockholder in said Exploration Mercantile Company, under and by virtue of the provisions of an act of the legislature of the State of Nevada, entitled "An Act providing a general corporation law," approved March 16th, 1903, the District Court of the First Judicial District, of the State of Nevada, in and for the County of Esmeralda, made an order and appointed C. E. Wylie, Receiver of said Exploration Mercantile Company (a corporation), and that said C. E. Wylie has duly qualified as such receiver, and he has been ever since the 6th day of August, 1908, and is now the duly appointed, qualified and acting

receiver of said State Court, and has now and ever since the said 6th day of August, 1908, has had in his possession and under his control, the assets of said [15] Exploration Mercantile Company, and manages the business thereof, under the direction and orders of said State Court and not otherwise; that it is to the best interests of said Exploration Mercantile Company that its business be kept as a going concern, and to that end the said receiver must purchase new goods and keep the said business well stocked; and also under said act of said legislature, aforesaid, and the proceedings pending in said State Court, it is the duty of said receiver to keep the said business going until a period of four months, have run, or such time as said State Court may direct, to enable creditors to present their claims in said State Court, so that they may be paid by said receiver; that said receiver represents the creditors and stockholders of said Exploration Mercantile Company, and will, in due time, under the orders of said State Court, pay the said creditors their just debts; that the proceeding was taken in said State Court for the very purpose of saving the assets of said Exploration Mercantile Company, from loss or waste and to that end, the assets of said Company are now under the control and jurisdiction of a court of competent jurisdiction, both of the subject matter and of said Exploration Mercantile Company, prior to any proceedings in this Hon. Court, and said State Court having such jurisdiction, affiant avers that this Hon. Court has no authority or jurisdiction in the premises to issue an injunction or an order staying proceedings

in the premises; that said Exploration Mercantile Company is a corporation which, under the State law aforesaid, can be put in the hands of receiver, without any intent or purpose of insolvency, but for the purpose of saving its assets, and preventing preferences to creditors, and such proceeding under said State law aforesaid is not an assignment, general or otherwise, within the meaning of the bankrupt act of the United States, but a means of avoiding insolvency or bankruptcy, so that when creditors are paid, there will be something left for stockholders; that the assets of said Exploration Mercantile Company are sufficient to pay all creditors, and there is no danger of irreparable loss or any loss to any of the creditors, and that the assets are under the control of the State Court, where no improper conduct on the part of the receiver or any mismanagement by him can take place, and each and every creditor can at any and all times invoke the aid of said State [16] Court and see that his rights are fully preserved and protected and said receiver for the faithful performance of his duty has given a good and sufficient bond in the sum of Fifty Thousand ($50,000) Dollars, which stands liable to the creditors that no waste or mismanagement shall take place, all of which these creditors fully know; that said bond can be increased at any time upon the application of the creditors in said State Court, and they and each of them can at any time proceed in said State Court in the proceeding there pending, and have any interest they may have fully protected so that there is no danger of loss or injury to said creditors; and affiant further avers

that he is informed and believes, as a matter of law, that this Hon. Court has no jurisdiction in the premises to enjoin said State Court or its receiver, and that the injunction has been improperly issued herein, and the restraining order improperly issued; that said receiver is a man of business ability and experience, and has been for a long time connected with the said Exploration Mercantile Company and perfectly familiar with its business and the conditions surrounding it, and was appointed by said State Court, because of his superior qualifications in that behalf; and affiant further states that he is the bookkeeper of said Exploration Mercantile Company, and also a director thereof, and has been the bookkeeper of said receiver and is familiar with the sales and transactions under said receiver, and that under the advertised sales of reduced prices of August 1st, 1908, as conducted by said receiver from August 7th, 1908, to Sept. 5th, 1908, on articles of goods, wares and merchandise other than paints, oils, hardware, crockery, etc., the net profit was (12%) twelve per cent, after deducting cost, of the merchandise, and expense of doing business and the paints, oils, hardware and crockery, etc., the net profits thereon after deducting the cost of the same and expenses of doing business, was (14%) fourteen per cent, so that no loss was in any manner sustained, and no danger of loss to creditors; that affiant is familiar with the assets of said Exploration Mercantile Company, and the market value thereof, in Goldfield.

FRANK G. HOBBS. [17]

Subscribed and sworn to before me this 15th day of September, A. D. 1908.

[Seal] I. S. THOMPSON,

Notary Public in and for the County of Esmeralda, State of Nevada.

[Indorsed]: No. 103. In the District Court of the United States in and for the District of Nevada. In the Matter of the Exploration Mercantile Company (a Corporation), an Alleged Bankrupt. Affidavit on Dissolution of Injunction and Stay of Proceedings. Filed September 18, 1908, at 10 o'clock A. M. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Thompson, Morehouse & Thompson.

In the District Court of the United States, in and for the District of Nevada.

No. 103.

In the Matter of EXPLORATION MERCANTILE COMPANY (a Corporation), an Alleged Bankrupt.

Demurrer.

The demurrer of Exploration Mercantile Company alleged bankrupt herein, to the petition of the Pacific Hardware and Steel Company (a corporation); J. A. Folger, and Company (a corporation); and Giant Powder Company, Consolidated, praying that said Exploration Mercantile Company be adjudicated a bankrupt, now this defendant by protestation, not confessing or acknowledging all or any of the matters and things in said petitioner's petition to be true in

such manner and form as the same are therein set forth, and alleged, demurs to (a) As to so much of said petition as reads as follows, to wit:

"And your petitioners further represent that said Exploration Mercantile Company a corporation, is insolvent, and that within four months next preceding the date of this petition, the said Exploration Mercantile Company, a corporation, committed an act of bankruptcy, in that it did heretofore, to wit, on the sixth day of August, A. D. 1908, being insolvent, apply for a receiver for its property; that is to say,

On the said sixth day of August, A. D. 1908, W. C. Stone, the President of said Exploration Mercantile Company, a corporation, filed his petition in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, entitled 'W. C. Stone, Plaintiff, vs. Exploration Mercantile Company, Defendant,' and being number 2792 of the files of said court, wherein he alleged that the assets of said corporation were in danger of waste, through attachment and litigation, and prayed that a receiver be appointed for its property and that the corporation be dissolved; and on the same day C. E. Wylie, the manager and director of said Exploration Mercantile Company, a corporation, filed in said last above mentioned cause, his application on behalf of said Exploration Mercantile Company, a corporation, as follows, to wit:

In the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda.

W. C. STONE,

Plaintiff,

vs.

EXPLORATION MERCANTILE COMPANY (a Corporation),

Defendant. [18]

Now comes C. E. Wylie, manager, and one of the directors of the above-named defendant, and enters the appearance of the said defendant in the above-entitled cause, and asks the above-entitled court to appoint as receiver of said defendant, C. E. Wylie, the undersigned, one of the directors of said corporation.

C. E. WYLIE,

Manager and Director of the Exploration Mercantile Company.

And that on said 6th day of August, A. D. 1908, the said C. E. Wylie did, in writing, file in said cause, admit and accept service of the summons issued in said cause for said corporation.

And your petitioners further represent that said District Court of the First Judicial District of the State of Nevada did on said sixth day of August, 1908, make its order, appointing said C. E. Wylie receiver of the property of said Exploration Mercantile Company, a corporation; that on or about the 7th day of August, 1908, said C. E. Wylie, qualified as such

receiver and thence hitherto has continued to act and has been in possession of said property."

And for cause of demurrer thereto states the following grounds: (a) That said petitioners are not entitled to the relief prayed for in said petition. (b) That the said act and proceeding in the State Court as averred in said petition was and is not an act of bankruptcy. (c) That it nowhere appears upon the face of said petition that said Exploration Mercantile Company is insolvent. (d) That it nowhere appears upon the face of said petition that said Exploration Mercantile Company ever filed any proceeding in the State Court or consented there, or (1) signed any writing by anyone authorized so to do or (2) made a distinct admission of its inability to pay its debts, or (3) made an unqualified expression of its willingness to be adjudged a bankrupt.

That it appears upon the face of said petition that the whole matter of the petition is now in a State Court, having complete and perfect jurisdiction in the premises of the subject matter, and of the said Exploration Mercantile Company, and of the assets of said Exploration Mercantile Company in the hands of its receiver, long before the petition herein was filed, in this court, and that therefore this court has no jurisdiction in the premises.

Wherefore, and for divers and other good causes of demurrer appearing in said petition, the Exploration Mercantile Company demurs thereto, and humbly demands the judgment of this Court whether it shall be compelled to make any further or other answer to said petition, and prays to be hence dismissed with

its costs, and charges in this behalf most wrongfully sustained.

THOMPSON, MOREHOUSE & THOMPSON,

Attorneys for Exploration Mercantile Company.

[19]

State of Nevada,

County of Esmeralda,—ss.

Frank G. Hobbs, being duly sworn, says that he is the Secretary and Treasurer of said Exploration Mercantile Company, and makes this affidavit in its behalf, and says the foregoing demurrer is not interposed for delay and that the same is true in point of fact.

FRANK G. HOBBS.

Subscribed and sworn to before me this 15th day of Sept. A. D. 1908.

[Seal] I. S. THOMPSON,

Notary Public, in and for the County of Esmeralda, State of Nevada.

I hereby certify that in my opinion, the foregoing demurrer is well founded in point of law.

H. V. MOREHOUSE,

Of Counsel for Exploration Mercantile Co.

[Indorsed]: No. 103. In the District Court of the United States in and for the District of Nevada. In the Matter of the Exploration Mercantile Company (a Corporation), an Alleged Bankrupt. Demurrer. Filed September 17, 1908, at 9 o'clock A. M. T. J. Edwards, Clerk. Thompson, Morehouse & Thompson, Attorneys for Explo. Merc. Co.

In re EXPLORATION MERCANTILE CO., in Bankruptcy.

Order Sustaining Demurrer.

The demurrer to the creditors' petition, heretofore argued and submitted, having been duly considered by the Court, it is now ordered that the same be, and is hereby, sustained; and that the petitioning creditors have twenty days' time in which to amend their petition.

[Answer and Demand for Jury.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of the EXPLORATION MERCANTILE COMPANY (a Corporation), an Alleged Bankrupt.

Now comes the Exploration Mercantile Company, the corporation against whom a petition for adjudication in bankruptcy has been filed, [20] herein, and does hereby controvert the amended petition, and files the following answer: I. That said Exploration Mercantile Company did not commit an act of bankruptcy as alleged in the amended petition, but, on the contrary, charges the fact to be that all proceedings taken in said District Court of the State of Nevada was taken against it and was not the act of said Exploration Mercantile Company.

II. That at the time of the filing in said State District Court of the proceeding set out in said amended petition, said Exploration Mercantile Com-

pany was not insolvent, but, on the contrary, avers that its property at a fair valuation was more than sufficient to pay its debts.

III. That said Exploration Mercantile Company never at any time applied for a receiver, and denies that there was no threatened litigation or threatened attachments against it, but, on the contrary, avers that a suit was brought and an attachment issued against it on the said 6th day of August, 1908, and released only by virtue of the said proceedings in said State District Court.

IV. That it is not true that W. C. Stone, C. E. Wylie and Frank G. Hobbs conspired or agreed to such measures or acts to hinder, delay and defraud the creditors of said Exploration Mercantile Company, or to compel said or such creditors to accept less than the full payment of their just claims or to wrongfully or otherwise obtain for said directors or officers a large part of the property of said Exploration Mercantile Company (a corporation), or that they or either of them intended to or would evade the laws of the United States, in reference to bankruptcy, or prevent said creditors from obtaining knowledge of the true condition of the affairs of said corporation or participating therein, or to prevent said creditors of a choice of a person or persons, as trustee or trustees of said corporation, or its property, or that in pursuance of any conspiracy or agreement said directors or officers acting for or in behalf of or as the act or deed of said corporation or that said corporation was then or there insolvent, on the 6th day of August, 1908, or at any other time caused to be filed

in said State District Court, the application set forth in said amended petition, or that any of the acts set out in said amended petition was the act or deed of said corporation, while insolvent or with a view of insolvency, or was [21] through any conspiracy or agreement to injure, delay or defraud any creditor or creditors of said corporation.

V. That said W. C. Stone did on or about the 8th day of September, 1908, make by way of compromise, and not otherwise, a proposition to said petitioners to adjust their claims upon a basis approximately at sixty per centum, but such proposition of compromise was not made in pursuance of or in furtherance of any conspiracy, but solely for the reason that by the wrongful and unjust acts of these petitioners in filing the original petition, herein, and causing an injunction to issue out of this court, they closed up the business of said corporation, then a going concern, to its great damage and to the damage and injury of the creditors thereof, and stopped and prevented the said corporation from carrying on and conducting its business, and drove its customers to other people and destroyed its goodwill, which was then and there of great value, and by reason thereof the said W. C. Stone made the said proposition of compromise and not otherwise.

VI. It is true that said officers, but not in conspiracy or agreement, have refused to let one J. L. Kennedy have access to its books, upon personal demand made by him, and for the reason that the said corporation was in the hands of a receiver in the said proceedings, in said State Court, and therefore

its books and papers were in the custody of the law and not in the custody and control of the officers and directors of said corporation and it avers; that said creditors or either of them could at any time apply to said State Court and obtain any inspection of the books of said corporation they or any of them desired.

VII. It is not true that said Exploration Mercantile Company or any of its officers have acquiesced in said proceedings, in said State Court, further than they were bound so to do, by reason of the nature and character of said proceedings, and as they were bound to do, under the State law applying to said proceeding.

VIII. That the proceeding in said State Court was commenced prior to the filing of the petition herein and that said State Court had jurisdiction in the premises both of the subject matter and person of said Exploration Mercantile Company, and its receiver was duly and regularly appointed and duly and regularly qualified, and was in the sole and exclusive possession of all the property of this corporation when the petition was [22] filed herein, and that said court was and is a separate court, over which this Hon. Court has no supervisory control or jurisdiction and that the proceedings in said State Court was not an act of bankruptcy, and therefore this Hon. Court has no jurisdiction in the premises and therefore it avers it should not be declared bankrupt, for any cause in said amended petition alleged, and this it prays and demands and that the matter

may be inquired into by a jury.

EXPLORATION MERCANTILE COMPANY.

By FRANK G. HOBBS,

Secretary.

State of Nevada,

County of Esmeralda,—ss.

Frank G. Hobbs, being duly sworn, says, that he is the Secretary of the Exploration Mercantile Company, alleged bankrupt herein, and does hereby make solemn oath that the statements of fact contained in the foregoing answer are true, according to the best of his knowledge, information and belief.

FRANK G. HOBBS.

Subscribed and sworn to before me this 28th day of October, A. D. 1908.

[Seal] H. M. FARNAM,

Notary Public in and for the County of Esmeralda, State of Nevada.

THOMPSON, MOREHOUSE & THOMPSON,

Attorneys for Alleged Bankrupt, Exploration Mercantile Company.

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of the Exploration Mercantile Company (a Corporation), an Alleged Bankrupt. Answer and Demand for Jury. Filed Oct. 30, 1908, at 9 o'clock A. M. T. J. Edwards, Clerk. Thompson, Morehouse & Thompson, Attorneys for Alleged Bankrupt, Goldfield, Nevada.

[Verdict.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

Interrogatory No. 1. Whether on the 6th day of August, 1908, the date of the appointment of C. E. Wylie, as Receiver of the Exploration Mercantile Company by the District Court of the First Judicial District of the State of Nevada in the case of W. C. Stone vs. Exploration Mercantile Company, the aggregate of the property of the said Exploration Mercantile Company was, at a fair valuation, sufficient in amount to pay its debts.

Answer. No. [23]

Interrogatory No. 2. Whether on the 12th day of September, 1908, the date of the filing of the petition in bankruptcy in these proceedings, the aggregate of the property of said Exploration Mercantile Company was, at a fair valuation, sufficient in amount to pay its debts.

Answer. No.

Interrogatory No. 3. Whether on the 6th day of August, A. D. 1908, the Exploration Mercantile Company, being insolvent, applied for a Receiver for its property.

Answer. Yes.

Dated, this 8th day of July, 1909.

Attest: S. J. HODGKINSON,

Foreman.

[Indorsed]: No. 103. U. S. Dist. Court, Dist. of Nevada. In re Exploration Mercantile Company. In Bankruptcy. Verdict. Filed July 8, 1909, at 4:15 o'clock P. M. T. J. Edwards, Clerk.

[Adjudication in Bankruptcy.]

In the District Court of the United States for the District of Nevada.

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY (a Corporation),

Bankrupt.

At Carson City, in said district, on the 9th day of July, A. D. 1909, before the Honorable E. S. Farrington, Judge of said court in bankruptcy, the petition of The Giant Powder Company, Consolidated, a corporation, Pacific Hardware and Steel Company, a corporation, and J. A. Folger and Company, a corporation, that Exploration Mercantile Company, a corporation, be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said Exploration Mercantile Company, a corporation, is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable E. S. FARRINGTON, Judge of said court, and the seal thereof, at Carson

City, in said district, on the 9th day of July, A. D. 1909.

[Seal] T. J. EDWARDS,
Clerk.
By H. D. Edwards,
Deputy.

[Indorsed]: No. 103. U. S. District Court, District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, Bankrupt. Adjudication. Filed July 9th, 1909, at 3 o'clock P. M. T. J. Edwards, Clerk. By H. D. Edwards, Deputy Clerk. [24]

[Order to Show Cause.]

In the District Court of the United States, in and for the District of Nevada.

No. 103—IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

On motion of petitioning creditors herein, supported by the affidavit of P. F. Carney, and good cause appearing therefor, it is hereby ordered and directed that you, W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, be and appear before this Court at Carson City, Ormsby County, State of Nevada, on the 21st day of July, A. D. 1909, at 10 o'clock A. M., to show cause, if any you have, why you and each of you should not be adjudged guilty of contempt of this Court for disobedience of

the lawful orders of this Court, as appears from the affidavit of P. F. Carney; and

It is further ordered that a copy of this order, together with a copy of the motion and said affidavit of P. F. Carney, be served upon the said W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse.

Dated this 9th day of July, A. D. 1909.

E. S. FARRINGTON,
Judge.

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of Exploration Mercantile Co., a Corporation, an Alleged Bankrupt. Order. Filed July 9th, 1909. T. J. Edwards, Clerk. By H. D. Edwards, Deputy.

RETURN.

United States of America,
District of Nevada,—ss.

I hereby certify that I received the within Order on the 9th day of July, 1909, and served the same (together with a copy of the Motion and the affidavit of P. F. Carney) on the within named W. C. Stone, C. E. Wylie, Frank G. Hobbs and H. V. Morehouse, at Carson City, in said district, on the 9th day of July, 1909.

Dated, July 10th, 1909.

H. J. HUMPHREYS,
U. S. Marshal.
By R. D. Goode,
Deputy.

Marshal's fees—4 services, $16.00.

[Affidavit of I. S. Thompson Answering Affidavit of P. F. Carney.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of the EXPLORATION MERCANTILE COMPANY (a Corporation), Bankrupt, and the Application of P. F. Carney, Esq., in Said Proceeding by Affidavit, and the Order of Hon. E. S. Farrington, Judge of Said Court, of Date July 9th, 1909, issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

[25]

Comes now I. S. Thompson, in his own behalf, and answering said affidavit of said P. F. Carney, and begs leave to reply thereto to show the following causes, why he should not be adjudged guilty of contempt, and first as to the facts, and second as to the law.

United States of America,
State of Nevada,—ss.

I, S. Thompson, being first duly sworn, says, that he is a regular practicing attorney, duly admitted to practice law in the Supreme Court of the State of Nevada, and in the United States District Court in and for the State of Nevada, and the United States Circuit Court for the Ninth Circuit and the United States Circuit Court of Appeals for the Ninth Circuit; that he resides at the town of Goldfield, in the County of Esmeralda, State of Nevada, and is a mem-

ber of the law firm of Thompson, Morehouse & Thompson, of Goldfield, consisting of I. S. Thompson, H. V. Morehouse and J. G. Thompson, and has been such member of said firm since the 15th day of August, 1906; that on the 6th day of August, 1908, W. C. Stone filed in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, his complaint in writing, in the words and figures following, to wit:

"*In the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda.*

W. C. STONE,

Plaintiff,

vs.

EXPLORATION MERCANTILE COMPANY,

Defendant.

The plaintiff complaining of the defendant alleges:

1. That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Nevada, with its principal place of business at Goldfield, in the County of Esmeralda, State of Nevada; that the defendant, as such corporation, has a capital stock of fifty thousand dollars ($50,000) divided into fifty thousand (50,000) shares of the par value of one ($1.00) dollar per share; that the officers of said corporation are the plaintiff, President; C. E. Wylie, Vice-president, and Frank G. Hobbs, Secretary and Treasurer; the directors of said company are: W. C. Stone, residence [26] Goldfield, Nevada, Frank G. Hobbs, residence, Goldfield,

Nevada, and C. E. Wylie, residence, Goldfield, Nevada; that the capital stock of said corporation has been fully paid up and that there is no stock in the treasury of said corporation. That said corporation has liabilities in the sum of about Sixty-five Thousand Dollars ($65,000), and has assets, exceeding the sum of Ninety-five Thousand Dollars ($95,-000); that among the creditors of said corporation defendant, and about the amounts owed to them, are: Pacific Hardware & Steel Co., San Francisco, California, in the sum of Fifteen Thousand Dollars; Giant Powder Company, Con., San Francisco, California, in the sum of Fifteen Thousand Dollars; J. R. Garrett, Marysville, California, in the sum of Ten Thousand ($10,000) Dollars; J. A. Folger & Company, San Francisco, California, in the sum of Two Thousand Eight Hundred Dollars ($2,800); Standard Oil Company, Sacramento, California, in the sum of Two Thousand Three Hundred Dollars ($2,300); and John S. Cook & Company of Goldfield, Nevada, in the sum of Sixteen Thousand Dollars ($16,000).

11. That, owing to the depressed condition in business, and the inability of said defendant corporation to the present time to collect the amounts owing to it, the said corporation is in danger of its assets being wasted through attachment or litigation, as the aforesaid claims and other claims are due, and the said corporation is liable at any time to be attached and therefore be unable to carry on and continue its business or to be put to very large and useless expense by way of litigation, and the assets of the property be wasted thereby.

That plaintiff is the holder of more than one-tenth (1/10) of the capital stock of the said corporation defendant, in his own name and person, fully paid up, and plaintiff avers that by reason of the facts aforesaid, the said corporation should be dissolved, and that a receiver should be appointed to take charge of the business affairs of said corporation, that its property may be preserved, its creditors paid, and its assets cared for.

Wherefore, plaintiff prays for the order of this Court appointing a receiver herein, to take charge of the affairs of said corporation, and conduct and manage the same, with a view to its dissolution, under the orders and directions of this Court, and that upon the filing of this complaint, [27] the Court appoint a receiver and fix the amount of bonds to be given by him upon his taking the oath of said appointment; that the Exploration Mercantile Company and the directors of said corporation, and each of them, be enjoined and restrained from exercising any of its powers or doing any business except through, by and under said receiver, and for such other and further relief as to the Court may seem meet and proper in the premises.

THOMPSON, MOREHOUSE & THOMPSON,
Attorneys for Plaintiff.

State of Nevada,
County of Esmeralda,—ss.

W. C. Stone, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint and knows the contents thereof, and the same is true of

his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters, he believes it to be true.

WALTER C. STONE.

Subscribed and sworn to before me this 6th day of August, 1908.

[Seal] I. S. THOMPSON,
Notary Public."

And thereupon summons was duly issued and served upon C. E. Wylie, Manager of the said Exploration Mercantile Company, who then and in reply to said complaint, made appearance in writing in said State Court, as follows:

"*In the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda.*

W. C. STONE,

Plaintiff,

vs.

EXPLORATION MERCANTILE COMPANY (a Corporation),

Defendant.

Now comes C. E. Wylie, Manager and one of the Directors of the above-named defendant, and enters the appearance of the said defendant in the above-entitled cause, and asks the above-named Court to appoint as receiver of said defendant, C. E. Wylie, the undersigned, one of the directors of said corporation.

C. E. WYLIE, [28]

Manager and Director of the Exploration Mercantile Company."

That the petition or complaint of said W. C. Stone was filed under and by virtue of Sec. 94, of the laws of the State of Nevada, relating to corporations; that said Exploration Mercantile Company was created, organized and transacting business as a corporation at Goldfield aforesaid, as a Nevada corporation, and that under said law aforesaid, the person to be appointed by said State Court, as Receiver, unless attacked as to his qualifications, had to be one of the Directors of the corporation and that C. E. Wylie was such director; that upon the entering of such appearance for said corporation, by said C. E. Wylie, the said Court made and entered the following order:

"*In the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda.*

W. C. STONE,

Plaintiff,

vs.

EXPLORATION MERCANTILE COMPANY (a Corporation),

Defendant.

Upon reading and filing the verified complaint of the plaintiff herein, and it appearing therefrom that the plaintiff is the owner and holder of over one-tenth of the capital stock of the Exploration Mercantile Company; that the assets of said corporation are in danger of waste through attachment, and litigation, and that such corporation should be dissolved, and a receiver appointed to take charge and manage and control the affairs of said corporation, and it ap-

pearing to be a proper case for the appointment of a receiver;

Now, by authority of an act of the legislature of the State of Nevada, entitled 'An Act providing a general corporation law,' approved March 16th, 1908, it is ordered that the said corporation be and is, so far as these proceedings are concerned, hereby dissolved; and that C. E. Wylie be appointed a receiver in the above-entitled proceedings, with full power to take charge of the assets, control and business of the Exploration Mercantile Company (a corporation) transacting business at Goldfield, in the [29] County of Esmeralda, State of Nevada, and to immediately list and report to the Court all the assets of said corporation, and its entire liabilities and to do any and all things as ordered and directed by this Court, and that he execute a bond for the faithful performance of his duties as such receiver in the sum of $50,000.00; that upon the approval and filing of such bond in the sum aforesaid, and taking the oath of office, as required by law, the aforesaid C. E. Wylie be, and he is hereby appointed receiver of the corporation defendant, to wit, The Exploration Mercantile Company, with full power to take charge of the business of said corporation and conduct the same and institute any and all suits for the collection of the assets of said company.

FRANK P. LANGAN,
Judge.

Dated at Goldfield, Nevada, this 6th day of August, 1908."

That in pursuance of said order, the said C. E. Wylie gave due and proper bond, and took oath of

office as such Receiver, and took into his possession the estate of said Exploration Mercantile Company, and commenced to carry on and conduct the business of said corporation, as Receiver of said court and as the officer of said court and not otherwise; that in the meantime the said corporation and its officers, were by the orders of said State Court, enjoined from acting, and the said corporation and its said officers have not to affiant's knowledge acted since that time, except to appear and defend in the bankruptcy proceedings in this court; that said affiant appeared and acted in said State Court as one of the attorneys for said Stone, and also as one of the attorneys for said Receiver, with permission of said State Court, the interests therein not being conflicting, and has not at any time represented any other parties herein in said State Court in said proceeding; that said proceeding in said State Court was not a proceeding upon a debt or claim provable or dischargeable in bankruptcy, and therefore affiant honestly and conscientiously believed, and still believes, that the proceeding in said State Court was one within the jurisdiction of said State Court, and that said State Court had full and complete jurisdiction of the subject matter and of the person of the defendant corporation, and that this Hon. Court in bankruptcy had no authority or jurisdiction to issue an [30] injunction or stay proceedings in said State Court; that thereafter on the —— day of September, 1908, this Hon. Court, sitting in bankruptcy, upon the application of the petitioners in this bankruptcy proceeding, as set forth in P. F. Carney's affidavit herein, made an order as follows, to wit:

"In the District Court of the United States, in and for the District of Nevada.

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY (a Corporation), an Alleged Bankrupt.

And now, this 12th day of September, 1908, on motion of said attorneys, it appearing to the Court that there is danger of irreparable injury to the creditors of the said debtor, unless the act sought to be enjoined is at once restrained, it is ordered that the above motion be heard at a session of said court, to be held at the City of Carson, on the 18th day of September, A. D. 1908, at 10 A. M.; and it is further ordered that, until the decision of this Court upon the said motion, the said parties against whom an injunction is prayed be restrained and they are hereby commanded, under such penalties as are inflicted by the laws of the United States, to abstain from the sale of, or in any other manner whatever disposing of the property or estate or any part thereof of the above-named Exploration Mercantile Company, a corporation.

E. S. FARRINGTON, Judge."

That affiant is not and was not aware of any other or further order of this Hon. Court, and affiant construed said order to be a stay order and not an order for an injunction, and then believed, and still believes, that this Hon. Court never made any order issuing or causing to be issued any injunction; that

affiant then construed the bankrupt law to mean that this Hon. Court had no power or authority to issue any stay order or injunction in the premises, because the proceedings in the State Court was not upon a claim or demand, provable or dischargeable in bankruptcy, and that therefore that said stay order was void and not lawful; that on the 18th day of September, A. D. 1908, H. V. Morehouse, a partner of affiant, appeared in this Hon. Court, and presented objections to said order, and orally argued the same before this Hon. Court, and as affiant is informed and believes this Hon. Court, took the same after argument under advisement, and this affiant is [31] not aware of any decision in the premises, and affiant further states that he knows of no order of any kind continuing said motion, or that said motion was otherwise heard, than as to affiant's objection to the same and demand by argument that the same be set aside as beyond the power of the court to make in the premises; that prior to the filing of the petition in bankruptcy herein, the said State Court through its said Receiver was conducting and carrying on the business of said corporation; that the building in which the corporation was conducting its business was not the property of said corporation, but that the corporation was a lessee, and that the rentals thereof of which said corporation should pay for the occupancy thereof was at that time and during all the times set out in P. F. Carney's affidavit was reasonably worth the sum of $500.00 per month, and that corporation had not paid any rentals as affiant is informed and believes, and

demand was being made by W. C. Stone, owner of said building, that the rentals be paid, and if not paid that said Receiver move therefrom, or suit would be brought to enforce the collection thereof and the recovery of triple damages as provided by the laws of the State of Nevada; that at this time no adjudication in bankruptcy had taken place in this Hon. Court, and the petitioning creditors herein gave no bond or undertaking so as to take possession of the assets of the corporation, and therefore so as to take possession of the assets of the corporation, and therefore as affiant believed and still believes no application could be made to this Court to have the matter of rent adjusted or paid, and as the property was in the possession of the State Court and never taken from it by this Court or any officer of this Court, it had to be looked after and preserved, stored and cared for, and therefore under these circumstances and none other said affiant believing that he was acting wisely and in the best interest of all concerned and lawfully and in obedience of his duty and not otherwise, did advise that said rentals be paid, because affiant knew that no other place could be procured for the storing and safekeeping of the assets of said corporation and to do so, would require the employment of men to be paid, the payment of rents and other expenditures, and still leave the aforesaid rentals due and unpaid, to be adjusted either in the State Court or this Court, and [32] further that any failure upon the part of said Receiver of said State Court, as he was the officer of that Court and held the possession of said property as such officer

and not otherwise, would make said Receiver liable upon his official bond, and said affiant, as the attorney for said Receiver and an officer of said State Court, would be recreant to his duty as such attorney not to advise and protect said Receiver as an officer of said Court, and affiant was compelled to choose and act, as he believed to be his sworn duty as an attorney at law in the premises, and then believed, and still believes, he acted rightly, and his action in the premises was with no intent to be disrespectful or to disobey or set at naught the order of this Court, and then believed, and still believes, he acted wisely and justly, and this accounts for the payment by said Receiver to said Stone of the said amount of $3,000.00 set out in the affidavit of said P. F. Carney. That at the time said payments were made by said Receiver this affiant believed that the same were for the best interests of said estate, and that the same were authorized by the law and by the order of the state court in appointing said receiver. It is true, that in connection with H. V. Morehouse, the law firm of Thompson, Morehouse & Thompson, has received from said C. E. Wylie the sum of $1,000.00, but says that the said State Court, prior to the payment thereof, made an order in writing directing the said Receiver as the officer of said State Court to pay said sum to the law firm of said Thompson, Morehouse & Thompson, as attorneys' fees for services rendered as attorneys for said Receiver and to be rendered; that affiant then fully believed, and still believes, that as the proceeding in the State Court was not upon a claim or demand dischargeable in

bankruptcy, and as the receiver in said State Court was the officer of said State Court, and acting only in that capacity and was not made a party to the proceeding in bankruptcy, that the said State Court had sole and separate jurisdiction in the premises, and this Hon. Court had no jurisdiction or authority to stay the proceeding in said State Court or enjoin said Receiver in said State Court, and that services for which affiant was paid by said Receiver was solely for said Receiver and not in behalf of or for said corporation, and so believing and so construing the law, and without any prejudice or unkindly feeling to this [33] Hon. Court, but in good faith, and fully believing that he was entitled to said fee, and that the same could be legally allowed by said State Court, and properly paid by said Receiver and that the same was not in violation of the power of this Hon. Court in the premises, the affiant so acted and not otherwise. And denies that he was willfully or contemptuously violating said order of this Hon. Court. That on, to wit, the 26th day of January, 1909, upon petition of W. P. Fuller & Co., a creditor of said Exploration Mercantile Company, filed a petition in said State Court, and obtained an order of said State Court commanding the said Receiver to within twenty days to file a complete inventory, and true valuation of the property in his hands and a complete statement of his expenditures as such Receiver, and that under said order said Receiver complied therewith, and the said statement and account came on to be heard, and the same was heard and thereupon the said State Court, among

other things, made the following order, to wit:

"And the said C. E. Wylie, as Receiver herein, is hereby directed and ordered to give notice to the Creditors of said Exploration Mercantile Company by publication in the 'Goldfield Chronicle,' a daily newspaper printed and published at Goldfield, in the town of Goldfield, County of Esmeralda, State of Nevada, for one week, that said Creditors appear and show cause, if any they have, before this Court, on the 15th day of March, 1909, at the courtroom of this court, in the courthouse, at the hour of 10 o'clock A. M. of that day. First: Why an order should not be made by this Court allowing and approving the accounts of receipts and disbursements made and filed herein by said Receiver; and Second: Why an order should not be made by this Court commanding and directing said C. E. Wylie, Receiver aforesaid, to sell at public or private sale the assets of said corporation, pay the creditors thereof, and wind up the affairs of said corporation. And it is further ordered that said Receiver shall notify further all the creditors who have filed their claims herein by sending to them personally through the United States mail a printed slip of said publication aforesaid, at lease fifteen days before the day set herein for hearing. Dated February 24th, 1909.

PETER J. SOMERS,

Judge." [34]

That in pursuance of said order, said Receiver gave the aforesaid notice by publication and by mail as therein provided; that no order of sale was ever entered in said Court; that prior to these proceed-

ings the said petitioning creditors had each of them filed and presented their several claims, and demands, duly verified by them, to and with said Receiver, saving and reserving in the same the following reservations: "does not waive or relinquish, but expressly reserves its legal rights as petitioning creditors, to proceed with its petition, and to have said Exploration Mercantile Company declared and adjudged a bankrupt in that certain bankruptcy proceeding now pending in the District Court of the United States in and for the District of Nevada, entitled 'In the Matter of the Exploration Mercantile Company, a corporation, an alleged bankrupt,' being No. 103, on the files of said District Court of the United States"; that no other objection to the proceedings in said State Court was made in the filing of their claims.

That on or about the 18th day of March, A. D. 1909, the following creditors of the Exploration Mercantile Company, to wit, Pacific Hardware & Steel Co., Giant Powder Company, Consolidated, J. A. Folger & Co., J. R. Garrett Co., Standard Oil Co., Western Fuel Co., Holbrook, Merrill & Stetson, John A. Roebling's Sons Co., Shea Bocquerax Co., American Biscuit Co., Nathan, Dohrmann Co., Sunlit Fruit Co., of West Berkeley, and James DeFremery & Co., duly served and filed a motion and notice of motion in the District Court of the Seventh Judicial District of the State of Nevada, in and for the County of Esmeralda, in the case entitled Walter C. Stone vs. The Exploration Mercantile Company, a corporation, wherein they asked an order of said

Court removing and discharging the receiver C. E. Wylie, heretofore appointed by said Court upon several grounds among which was the following: "4th: That C. E. Wylie, Receiver, has, since his appointment as Receiver of the Defendant, Exploration Mercantile Company, paid out and expended large sums of money without any authorization or authority so to do as such Receiver, or without obtaining any order of court for the payment of the same, and that the expenditure of said large sums of money has depleted said estate and has become a total loss to the same." That thereafter, upon the said motion of said creditors, the Court rendered its decision [35] and denied said motion. That in denying said motion the Court, in reference to the attorneys' fees paid by said Receiver as set forth in P. F. Carney's affidavit, said in part: "It is true that he has employed counsel at his own instance and has paid them the sum of $1,000.00, but the law certainly gives him such right, when his duties convince him that he needs legal advice, and assistance, and the evidence clearly shows that he needed attorneys and that he refused to pay them unless the Court ordered such payment, and that the Court made an order authorizing the payment of $1,000.00, to his attorneys,—that the sum of $1,000 was an extremely reasonable sum to be paid his attorneys for services rendered up to the time of such payment."

And in reference to the payment of the rent by said Receiver as set forth in said affidavit, the Court said: "Such payment would not be misconduct, and particularly when he was confronted with a difficulty

that he could not readily get another place to store the goods, and that the rent had to be paid or else removed, but nevertheless the reasonableness of such payment is a matter to be finally disposed of in his final account, and the creditors cannot in any event be injured by such payment, when the facts are that he has not paid any rents whatever since that time, and it can hardly be contended that the landlord will not be entitled to a reasonable rental for his premises while occupied as they are and necessarily must be until the final determination of this cause. There is nothing in the evidence which shows that at any time the acts of the Receiver or his attorneys have been antagonistic or prejudicial to any of the creditors; on the contrary, the evidence shows that their efforts have been directed solely to have the administration of this estate conducted under the supervision of this Court, in this proceeding, and if they had not been interfered with that these objecting creditors would be to-day in much better position than they now are. Upon the whole matter of this motion, I am fully convinced that the motion is without merit, and that C. E. Wylie, Receiver, herein has at all times acted properly, prudently, and with sound judgment, free from bias or prejudice, and that he was and is a proper person to be Receiver in this action, and that he has always acted honestly and impartially, and is in every way a suitable and proper person to discharge the duties of his trust. The motion to remove the Receiver is denied." That by the filing of such [36] claims by said creditors, and the said motion to remove said Re-

ceiver in said State Court, they would waive and did waive all objections to the jurisdiction of said State Court. And affiant believed it was his duty to obey the order of said State Court, and he only thus acted and not otherwise, and in all his acts he has had and still has the highest and sincerest regard for the Judge of this Hon. Court, and the greatest respect for the Court over which he presides, but then believed, and still believes, that in the matter and things for which he is charged as in contempt in this proceeding the said State Court had jurisdiction and that it was his duty to obey said Court, and to comply with its orders, and in so doing affiant avers that he is not guilty of contempt of this Court, and that in all his acts in the premises he has acted in good faith, and with no intent to contemptuously disobey the orders of this Hon. Court, and therefore respectfully prays this Hon. Court to dismiss proceedings against him.

I. S. THOMPSON.

Subscribed and sworn to before me this 21st day of May, A. D. 1910.

[Seal] EDWARD T. PATRICK,

Notary Public in and for the County of Esmeralda, State of Nevada.

[Indorsed]: In the District Court of the United States, in and for the District of Nevada. In the Matter of the Exploration Mercantile Company (a Corporation), Bankrupt, and the application of P. F. Carney, Esq., in Said Proceeding by Affidavit, and the Order of Hon. E. S. Farrington, Judge of Said

Court, of Date July 9th, 1909, issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Affidavit of I. S. Thompson. Filed May 26, 1910, at 10:15 o'clock A. M. T. J. Edwards, Clerk.

[Affidavit of H. V. Morehouse Answering Affidavit of P. F. Carney.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of the EXPLORATION MERCANTILE COMPANY (a Corporation), Bankrupt, and the Application of P. F. Carney, Esq., in Said Proceeding by Affidavit, and the Order of Hon. E. S. Farrington, Judge of Said Court, of Date July 9th, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson, and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of a Contempt, etc.

Comes now H. V. Morehouse, in his own behalf, and answering said affivavit of said P. F. Carney, and begs leave to reply thereto to show the [37] following causes why he should not be adjudicated guilty of contempt, and first as to the facts, and second as to the law.

United States of America,
State of Nevada,—ss.

H. V. Morehouse, being first duly sworn, says that he is a regular practicing attorney, duly admitted to practice law in the Supreme Court of the State of

Nevada, and in the United States District Court in and for the State of Nevada, and the United States Circuit for the Ninth Circuit and the United States Circuit Court of Appeals for the Ninth Circuit and in the Supreme Court of the United States; that he resides at the town of Goldfield in the County of Esmeralda, State of Nevada, and is a member of the law firm, at Goldfield aforesaid, of Thompson, Morehouse & Thompson, consisting of I. S. Thompson, H. V. Morehouse and J. G. Thompson, and has been such member of said firm since the 15th day of August, 1906; that on the 6th day of August, 1908, W. C. Stone filed in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, his complaint in writing, in the words and figures following, to wit:

"*In the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda.*

W. C. STONE,

Plaintiff,

vs.

EXPLORATION MERCANTILE COMPANY,

Defendant.

The plaintiff complaining of the defendant alleges:

1. That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Nevada, with its principal place of business at Goldfield, in the County of Esmeralda, State of Nevada; that the defendant, as such corporation, has a capital stock of Fifty Thousand ($50,000), divided

into fifty thousand (50,000) shares of the par value of One ($1.00) dollar per share; that the officers of said corporation are the plaintiff, President; C. E. Wylie, Vice-President; and Frank G. Hobbs, Secretary and Treasurer; the directors of said company are: W. C. Stone, residence, [38] Goldfield, Nevada; Frank G. Hobbs, residence, Goldfield, Nevada; and C. E. Wylie, residence, Goldfield, Nevada; that the capital stock of said corporation has been fully paid up and that there is no stock in the treasury of said corporation. That said corporation has liabilities in the sum of about Sixty-five Thousand Dollars ($65,000), and has assets, exceeding the sum of Ninety-five Thousand Dollars ($95,000); that among the creditors of said corporation defendant, and about the amounts owed to them, are: Pacific Hardware & Steel Co., San Francisco, California, in the sum of Fifteen Thousand Dollars; Giant Powder Company, Con., San Francisco, California, in the sum of Fifteen Thousand Dollars; J. R. Garrett, Marysville, California, in the sum of Ten Thousand ($10,000) Dollars; J. A. Folger & Company, San Francisco, California, in the sum of Two Thousand Eight Hundred Dollars ($2,800); Standard Oil Company, Sacramento, California, in the sum of Two Thousand Three Hundred Dollars ($2,300); and John S. Cook & Company of Goldfield, Nevada, in the sum of Sixteen Thousand Dollars ($16,000).

11. That, owing to the depressed condition in business, and the inability of said defendant corporation to the present time to collect the amounts owing to it, the said corporation is in danger of its

assets being wasted through attachment or litigation, as the aforesaid claims and other claims are due, and the said corporation is liable at any time to be attached and therefore be unable to carry on and continue its business or to be put to very large and useless expense by way of litigation, and the assets of the property be wasted thereby.

That plaintiff is the holder of more than one-tenth (1/10) of the capital stock of the said corporation defendant, in his own name and person, fully paid up, and plaintiff avers that by reason of the facts aforesaid, the said corporation should be dissolved, and that a receiver should be appointed to take charge of the business affairs of said corporation, that its property may be preserved, its creditors paid, and its assets cared for.

Wherefore, plaintiff prays for the order of this Court, appointing a receiver herein, to take charge of the affairs of said corporation, and conduct and manage the same, with a view to its dissolution, under the orders and directions of this Court, and that upon the filing of this complaint, [39] the Court appoint a receiver and fix the amount of bonds to be given by him upon his taking the oath of said appointment; that the Exploration Mercantile Company and the directors of said corporation, and each of them, be enjoined and restrained from exercising any of its powers or doing any business except through, by and under said receiver, and for such other and further relief as to the Court may seem meet and proper in the premises.

THOMPSON, MOREHOUSE & THOMPSON,

Attorneys for Plaintiff.

State of Nevada,
County of Esmeralda,—ss.

W. C. Stone, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint, and knows the contents thereof, and the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters, he believes it to be true.

WALTER C. STONE.

Subscribed and sworn to before me this 6th day of August, 1908.

[Seal] I. S. THOMPSON,
Notary Public."

And thereupon summons was duly issued and served upon C. E. Wylie, Manager of the said Exploration Mercantile Company, who then and in reply to said complaint made appearance in writing in said State court, as follows:

"*In the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda.*

W. C. STONE,
Plaintiff,
vs.
EXPLORATION MERCANTILE COMPANY (a Corporation),
Defendant.

Now comes C. E. Wylie, Manager and one of the Directors of the above-named defendant, and enters

the appearance of the said defendant in the above-entitled cause, and asks the above-named court to appoint as receiver of said defendant, C. E. Wylie, the undersigned, one of the directors of said corporation.

C. E. WYLIE, [40]

Manager and Director of the Exploration Mercantile Company."

That the petition or complaint of said W. C. Stone, was filed under and by virtue of sec. 94, of the laws of the State of Nevada, relating to corporations; that said Exploration Mercantile Company was created, organized and transacting business as a corporation at Goldfield aforesaid, as a Nevada corporation, and that under said law aforesaid, the person to be appointed by said State Court, as Receiver, unless attacked as to his qualifications, had to be one of the Directors of the corporation and that C. E. Wylie was such director; that upon the entering of such appearance for said corporation, by said C. E. Wylie, the said Court made and entered the following order:

"In the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda.

W. C. STONE,

Plaintiff,

vs.

EXPLORATION MERCANTILE COMPANY (a Corporation),

Defendant.

Upon reading and filing the verified complaint of the plaintiff herein, and it appearing therefrom that the plaintiff is the owner and holder of over one-tenth of the capital stock of the Exploration Mercantile Company; that the assets of said corporation are in danger of waste through attachment, and litigation, and that such corporation should be dissolved, and a receiver appointed to take charge and manage and control the affairs of said corporation, and it appearing to be a proper case for the appointment of a receiver;

Now, by authority of an act of the legislature of the State of Nevada, entitled 'An Act providing a general corporation law,' approved March 16th, 1908, it is ordered that the said corporation be and is, so far as these proceedings are concerned, hereby dissolved; and that C. E. Wylie be appointed a receiver in the above-entitled proceedings, with full power to take charge of the assets, control and business of the Exploration Mercantile Company (a corporation) transacting business at Goldfield, in the [41] County of Esmeralda, State of Nevada, and to immediately list and report to the Court all the assets of said corporation, and its entire liabilities and to do any and all things as ordered and directed by this Court, and that he execute a bond for the faithful performance of his duties as such receiver in the sum of $50,000.00; that upon the approval and filing of such bond in the sum aforesaid, and taking the oath of office, as required by law, the aforesaid C. E. Wylie be, and he is hereby, appointed receiver of the corporation defendant to wit, The Exploration

Mercantile Company, with full power to take charge of the business of said corporation and conduct the same and institute any and all suits for the collection of the assets of said company.

FRANK P. LANGAN,
Judge.

Dated at Goldfield, Nevada, this 5th day of August, 1908."

That in pursuance of said order, the said C. E. Wylie gave due and proper bond, and took oath of office as such Receiver, and took into his possession the estate of said Exploration Mercantile Company, and commenced to carry on and conduct the business of said corporation, as Receiver of said court and as the officer of said court and not otherwise; that in the meantime the said corporation and its officers were by the orders of said State Court enjoined from acting, and the said corporation and its said officers have not to affiant's knowledge acted since that time, except to appear and defend in the bankruptcy proceedings in this court; that said affiant appeared and acted in said State Court as one of the attorneys for said Stone, and also as one of the attorneys for said Receiver, with permission of said State Court, the interests therein not being conflicting, and has not at any time represented any other parties herein in said State Court in said proceeding; that said proceeding in said State Court was not a proceeding upon a debt or claim provable or dischargeable in bankruptcy, and therefore affiant honestly and conscientiously believed, and still believes, that the proceeding in said State Court was

one within the jurisdiction of said State Court, and that said State Court had full and complete jurisdiction of the subject matter and of the person of the defendant corporation, and that this Hon. Court in Bankruptcy had no authority or jurisdiction to issue an [42] injunction or stay proceedings in said State Court; that thereafter on the —— day of September, 1908, this Hon. Court, sitting in bankruptcy, upon the application of the petitioners in this bankruptcy proceeding, as set forth in P. F. Carney's affidavit herein, made an order as follows, to wit:

"*In the District Court of the United States, in and for the District of Nevada.*

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY (a Corporation), an Alleged Bankrupt.

And now, this 12th day of September, 1908, on motion of said attorneys, it appearing to the Court that there is danger of irreparable injury to the creditors of the said debtor, unless the act sought to be enjoined is at once restrained, it is ordered that the above motion be heard at a session of said court, to be held at the City of Carson, on the 18th day of September, A. D. 1908, at 10 A. M.; and it is further ordered that until the decision of this Court upon the said motion, the said parties against whom an injunction is prayed be restrained and they are hereby commanded, under such penalties as are inflicted by the laws of the United States, to abstain

from the sale of, or in any other manner whatever disposing of the property or estate or any part thereof of the above-named Exploration Mercantile Company, a corporation.

E. S. FARRINGTON,
Judge."

That affiant is not and was not aware of any other or further order of this Hon. Court, and affiant construed said order to be a stay order and not an order for an injunction, and then believed, and still believes, that this Hon. Court never made any order issuing or causing to be issued any injunction; that affiant then construed the bankrupt law to mean that this Hon. Court had no power or authority to issue any stay order or injunction in the premises, because the proceedings in the State Court was not upon a claim or demand, provable or dischargeable in bankruptcy, and that therefore that said stay order was void and not lawful; that on the 18th day of September, A. D. 1908, said affiant appeared in this Hon. Court, and presented objections to said order, and orally argued the same before this Hon. Court, and as affiant is informed and believes this Hon. Court took the same after argument under advisement, and he is [43] not aware of any decision in the premises, and affiant further states that he knows of no order of any kind continuing said motion, or that said motion was otherwise heard, than as to affiant's objection to the same and demand by argument that the same be set aside as beyond the power of the Court to make in the premises; that prior to the filing of the petition in bankruptcy herein, the said State Court through

its said Receiver was conducting and carrying on the business of said corporation; that the building in which the corporation was conducting its business was not the property of said corporation, but that the corporation was a lessee, and that the rentals thereof of which said corporation should pay for the occupancy thereof was at that time and during all the times set out in P. F. Carney's affidavit was reasonably worth the sum of $500.00 per month, and that corporation had not paid any rentals as affiant is informed and believes, and demand was being made by W. C. Stone, owner of said building, that the rentals be paid, and if not paid, that said Receiver move therefrom, or suit would be brought to enforce the collection thereof and the recovery of triple damages as provided by the laws of the State of Nevada; that at this time no adjudication in bankruptcy had taken place in this Hon. Court, and the petitioning creditors herein gave no bond or undertaking so as to take possession of the assets of the corporation, and therefore, as affiant believed, and still believes, no application could be made to this Court to have the matter of rent adjusted or paid, and as the property was in the possession of the State Court and never taken from it by this court or any officer of this court, it had to be looked after and preserved, stored and cared for, and therefore under these circumstances and none other said affiant believing that he was acting wisely and in the best interest of all concerned and lawfully and in obedience of his duty, and not otherwise, did advise that said rentals be paid, because affiant knew that no other place could be procured for the storing and

safekeeping of the assets of said corporation, and to do so, would require the employment of men to be paid, the payment of rents and other expenditures, and still leave the aforesaid rentals due and unpaid, to be adjusted either in the State Court or this court, and [44] further, that any failure upon the part of said Receiver of said State Court, as he was the officer of that court and held the possession of said property as such officer and not otherwise, would make said Receiver liable upon his official bond, and said affiant, as the attorney for said Receiver and an officer of said State Court, would be recreant to his duty as such attorney not to advise and protect said Receiver as an officer of said court, and affiant was compelled to choose and act, as he believed to be his sworn duty as an attorney at law in the premises, and then believed, and still believes, he acted rightly, and his action in the premises was with no intent to be disrespectful or to disobey or set at naught the order of this Court, and then believed, and still believes, he acted wisely and justly, and this accounts for the payment by said Receiver to said Stone of the said amount of $3,000.00 set out in the affidavit of said P. F. Carney. It is true that affiant did advise said C. E. Wylie to collect outstanding claims and sums due and owing said corporation, because the conditions surrounding Goldfield at the time were such that unless collections were made, the same would be lost to the corporation by reason of the debtors leaving Goldfield or getting in a condition to make the debtors financially irresponsible, and because said affiant was not then nor is he now aware of any order of this

Court, prohibiting the collection of money or conserving the estate of the corporation. It is true that in connection with I. S. Thompson, he has received from said C. E. Wylie the sum of $1,000.00, but says that the said State Court, prior to the payment thereof, made an order in writing directing the said Receiver as the officer of said State Court to pay said sum to the law firm of said Thompson, Morehouse & Thompson, as attorneys' fees for services rendered as attorneys for said Receiver, and to be rendered; that affiant then fully believed, and still believes, that as the proceeding in the State Court was not upon a claim or demand dischargeable in bankruptcy, and as the receiver in said State Court was the officer of said State Court, and acting only in that capacity and was not made a party to the proceeding in bankruptcy, that the said State Court had sole and separate jurisdiction in the premises, and this Hon. Court had no jurisdiction or authority to stay the proceeding in said State Court or enjoin said Receiver in said [45] State Court, and that services for which affiant was paid by said Receiver was solely for said receiver and not in behalf of or for said corporation, and so believing and so construing the law, and without any prejudice or unkindly feeling to this Hon. Court, but in good faith and fully believing that he was entitled to said fee, and that the same could be legally allowed by said State Court and properly paid by said Receiver, and that the same was not in violation of the power of this Hon. Court in the premises, the affiant so acted and not otherwise. And denies that he has wilfully or contemptuously violated said order of

this Hon. Court; denied that he has at any time advised the Hon. Peter J. Somers "to pay no attention to the action of the Federal Court," but in that behalf says, that on, to wit, the 26th day of January, 1909, upon petition of W. P. Fuller & Co., a creditor of said Exploration Mercantile Company, filed a petition in said State Court, and obtained an order of said State Court commanding the said Receiver to within twenty days to file a complete inventory, and true valuation of the property in his hands and a complete statement of his expenditures as such Receiver, and that under said order said Receiver complied therewith, and the said statement and account came on to be heard, and the same was heard and thereupon the said State Court, among other things, made the following order, to wit: "And the said C. E. Wylie, as Receiver herein, is hereby directed and ordered to give notice to the Creditors of said Exploration Mercantile Company by publication in the 'Goldfield Chronicle,' a daily newspaper printed and published at Goldfield, in the town of Goldfield, County of Esmeralda, State of Nevada, for one week, that said creditors appear and show cause, if any they have, before this Court, on the 15th day of March, 1909, at the courtroom of this court, in the courthouse, at the hour of 10 o'clock A. M. of that day,

First: Why an order should not be made by this Court allowing and approving the accounts of receipts and disbursements made and filed herein by said Receiver; and Second: Why an order should not be made by this Court commanding and directing said C. E. Wylie, Receiver aforesaid, to sell at public or

private sale the assets of said corporation, pay the creditors thereof, and wind up the affairs of said corporation. And it is further [46] ordered that said Receiver shall notify further all the creditors who have filed their claims herein by sending to them personally through the United States mail, a printed slip of said publication aforesaid, at least fifteen days before the day set herein for hearing. Dated February 24th, 1909.

PETER J. SOMERS, Judge."

That in pursuance of said order, said Receiver gave the aforesaid notice of publication and personally as therein provided, that no order of sale was ever entered in said court; that prior to these proceedings the said petitioning creditors had each of them filed and presented their several claims, and demands, duly proved by them, to and with said Receiver, saving and reserving in the same the following reservations: "does not waive or relinquish, but expressly reserves its legal rights as petitioning creditor, to proceed with its petition, and to have said Exploration Mercantile Company declared and adjudged a bankrupt in that certain bankruptcy proceeding now pending in the District Court of the United States in and for the District of Nevada, entitled 'In the matter of the Exploration Mercantile Company, a corporation, an alleged bankrupt,' being No. 103, on the files of said District Court of the United States"; that no other objection to the proceedings in said State Court was made in the filing of their claims, and therefore affiant fully believed that said petitioners and the other creditors would have no objection to a sale of said

property, and that the proceeds thereof could be held and the expenses and costs saved, to all concerned, and that by notifying all the creditors they could present such objections thereto as they might think proper, and that by the filing of such claim these creditors would waive and did waive all objections to the jurisdiction of said State Court, and further, that said stay order in this Hon. Court was not binding upon the said Receiver or said State Court, because said Receiver was not a party to the proceedings herein in bankruptcy, and the suit pending in said State was not a suit stayed by the proceedings in bankruptcy or one that this Hon. Court could stay, and the only advice the affiant ever gave to said Peter J. Somers was to argue in said State Court the law in the premises as he, affiant, understood it, and still understands it, and affiant avers it was his duty to present to said [47] State Court the law as he understood it, and to obey the orders of said State Court, and he only thus acted and not otherwise, and in all his acts he has had and still has the highest and sincerest regard for the Judge of this Hon. Court, but then believed, and still believes, that in the matters and things for which he is charged as in contempt in this proceeding the said State Court had jurisdiction, and that it was his duty to obey said court, and to comply with its orders, and in so doing affiant avers that he is not guilty of contempt of this Court and that in all his acts in the premises he had acted in good faith, and with no intent to contemptuously disobey the orders of this Hon. Court, and therefore respect-

fully prays this Hon. Court to dismiss these proceedings against him.

H. V. MOREHOUSE.

Subscribed and sworn to before me this 20th day of May, A. D. 1910.

[Seal] I. S. THOMPSON,

Notary Public, in and for County of Esmeralda, State of Nevada.

[Endorsed]: In the District Court of the United States, in and for the District of Nevada. In the Matter of the Exploration Mercantile Company, (a Corporation), Bankrupt, and the Application of P. F. Carney, Esq., in said Proceeding by Affidavit, and the Order of Hon. E. S. Farrington, Judge of Said Court, of Date July 9th, 1909, Issued to W. C. Stone, C. E. Wylie, Frank Hobbs, I. S. Thompson, and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Affidavit of H. V. Morehouse. Filed May 26, 1910, at 10:15 o'clock A. M. T. J. Edwards, Clerk. No. 103.

[Affidavit of C. E. Wylie Answering Affidavit of P. F. Carney.]

In the District Court of the United States in and for the District of Nevada.

In the Matter of the EXPLORATION MERCANTILE COMPANY (a Corporation), Bankrupt, and the Application of P. F. Carney, Esq., in Said Proceeding by Affidavit and the Order of Hon. E. S. Farrington, Judge of Said Court, of Date July 9th, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S.

Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

Comes now C. E. Wylie, in his own behalf, and answering the affidavit of P. F. Carney, begs leave to present this his answer to the order to show cause:

United States of America,
State of Nevada,—ss.

C. E. Wylie, being [48] duly sworn, says: That he has read the affidavits of H. V. Morehouse and I. S. Thompson herein, and knows the contents thereof, and that the same are true, and that he hereby adopts the same and makes the same a part of this affidavit and states that all his acts and conduct in the premises were solely as the Receiver of said State Court, and not otherwise; that he never at any time acted for or as an officer of said corporation in the proceedings in the said State Court, and that all his acts were under oral or written instructions of said State Court; that he has the highest regard and respect for this Hon. Court, and denies that he has ever at any time by thought or deed, wilfully or purposely disobeyed the order or orders of this Court, except in so far that as the officer of said State Court under oath and bond to said State Court, he believed he was in duty bound to act in pursuance to his official position as such Receiver of said State Court. That he has never acted in the premises other than as such State Court receiver. Wherefore, affiant prays that this his answer be accepted and the order to show cause be vacated and he be hence dismissed.

C. E. WYLIE.

Subscribed and sworn to before me this 21st day of May, A. D. 1910.

[Seal] I. S. THOMPSON,

Notary Public in and for the County of Esmeralda, State of Nevada.

[Endorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of the Exploration Mercantile Company (a Corporation), Bankrupt, and the Application of P. F. Carney, Esq., in Said Proceeding by Affidavit, and the Order of Hon. E. S. Farrington, Judge of Said Court, of Date July 9th, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson, and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Affidavit of C. E. Wylie. Filed May 26th, 1910, at 10:15 o'clock A. M. T. J. Edwards, Clerk.

Re EXPLORATION MERCANTILE CO., Bankrupt.

Minutes of Court.

The matter of contempt of W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson, and H. V. Morehouse coming on regularly for hearing this day, Messrs. Detch & Carney, E. E. Roberts and J. L. Kennedy, appear for petitioning creditors; George S. Green, Esq., for respondents, [49] Wylie, Thompson and Morehouse. It was agreed and stipulated by counsel that the final order of the Court, in this matter, should apply to and bind the respond-

ents, Stone and Hobbs, who are without the district. On behalf of the respondents Mr. Green read and filed the separate affidavits of respondents, Morehouse, Thompson and Wylie; and offered in evidence all the records and files in this case. Mr. Carney read and offered his affidavit, filed July 9th, 1909, the original subpoena issued herein, with the Marshal's return of service, affidavit of P. F. Carney, filed May 17, 1909, and petitioning creditors' exhibit No. 10; also, "Testimony and Proceedings," in the State Court, filed herein this day. The matter was then argued by Mr. Green, on behalf of the respondents.

Re EXPLORATION MERCANTILE COMPANY, Bankrupt.

Minutes of Court.

On this day this matter was argued by Mr. Carney, on behalf of the petitioning creditors; and the same was thereupon submitted and taken under advisement, with leave to respondents to file their brief within thirty (30) days; the petitioning creditors to have ten days thereafter to reply, if desired.

[Findings and Decree.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, a Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of

Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

[Order Adjudging Guilty of Contempt.]

This cause came on regularly to be heard on the 26th day of May, A. D. 1910, on the motion of the petitioning creditors, hereinafter named, upon the affidavits and evidence submitted by the respective parties, J. L. Kennedy, Detch & Carney and E. E. Roberts appearing as attorneys for The Giant Powder Company Consolidated, Pacific Hardware & Steel Company and [50] J. A. Folger & Company, said petitioning creditors, and George W. Green and H. V. Morehouse appearing as attorneys for said W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, and, after argument, oral and written, it appears to the Court, and it so finds:

That on the 12th day of September, 1908, the said petitioning creditors filed their petitions in the above-entitled court praying that the Exploration Mercantile Company, a corporation, be adjudged bankrupt within the purview of the acts of Congress relating to bankruptcy; that said Exploration Mercantile Company and C. E. Wylie, its receiver, be enjoined and restrained from disposing of its property, goods, wares and merchandise, or any part thereof; and that further proceedings in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, in the cause entitled "W. C. Stone, Plaintiff, vs. Exploration Mercantile Company, Defendant," be stayed pursuant to the bank-

ruptcy laws of the United States in such cases made and provided, and that an injunction be issued out of this Honorable Court directed to the said W. C. Stone, C. E. Wylie and Exploration Mercantile Company, restraining them, their agents, servants, attorneys and counselors from further prosecuting said suit in said State Court: That thereupon and on said 12th day of September, 1908, this Honorable Court made its two certain orders, copies of which are as follows to wit:

"*In the District Court of the United States in and for the District of Nevada.*

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

United States of America,
District of Nevada,—ss.

The President of the United States of America, to W. C. Stone, C. E. Wylie and Exploration Mercantile Company, a Corporation, Greeting:

Whereas, a petition has been filed on the bankruptcy side of the District Court of the United States for the District of Nevada, praying for an injunction to restrain the prosecution of a certain suit pending in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, in which said W. C. Stone is plaintiff, and Exploration Mercantile Company is defendant, and has obtained an allowance for an injunction, as prayed for in said petition from the District Court of the

United States for the District of Nevada:

Now, therefore, we, having regard to the matters in said petition contained, do hereby command and strictly enjoin you, the said W. C. Stone, C. E. Wylie, and Exploration Mercantile Company, a corporation, or either of you, and each of your agents, servants, attorneys or counsellors, from further prosecuting said suit in said Court, and from taking any further steps or [51] proceeding in said action or suit now pending, as aforesaid, which commands and injunction you are respectively required to observe until our said District Court shall make further order in the premises. Hereof, fail not, under the penalty of law thence ensuing.

Witness, the Honorable E. S. FARRINGTON, District Judge of the United States for the District of Nevada, this 12th day of September, A. D. 1908, and in the hundred and thirty-third of the Independence of the United States of America.

[Seal] T. J. EDWARDS,
Clerk of Said Court."

"*In the District Court of the United States, in and for the District of Nevada.*

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

Respectfully represents The Giant Powder Company Consolidated, a corporation, Pacific Hardware and Steel Company, a corporation, and J. A. Folger and Company, a corporation, that they are the peti-

tioners which have filed their petition in the above-entitled matter, praying that the said Exploration Mercantile Company, a corporation, be adjudicated a bankrupt. That said Exploration Mercantile Company, a corporation, has a stock of goods, wares and merchandise consisting of hardware, groceries and other merchandise in Goldfield, District of Nevada, a stock of similar goods at the town of Jamestown in said district, and another stock of similar merchandise at the town of Hornsilver in said District. That W. C. Stone, the President of said Exploration Mercantile Company has stated to petitioners that said corporation has been doing business at a considerable loss during the last four or five months next prior to the appointment of the receiver mentioned in the petition on file herein. That on or about the first day of August, 1908, said corporation advertised a sale of said merchandise at reduced prices and said receiver, C. E. Wylie, has informed your petitioners that said corporation for some days prior to the appointment of said receiver, and said receiver since that time, has been selling parts of said merchandise at greatly reduced prices. That said receiver has been procuring new merchandise and conducting the business and selling large quantities of goods. That in the petition filed in the District Court of the First Judicial District of the State of Nevada, mentioned in the petition on file herein, the said W. C. Stone prayed that receiver take charge of the affairs of said corporation, and conduct and manage the same with a view to its dissolution, and in the order made pursuant to said petition the said District Court ordered that the

said corporation be, as far as the proceedings therein are concerned, dissolved, and that C. E. Wylie be appointed receiver with full power to take charge of the assets, control and business of the Exploration Mercantile Company.

That said petitioners are fearful that said goods, wares and merchandise will be dissipated and that they will sustain irreparable injury unless an injunction or restraining order be entered herein enjoining or restraining the said Exploration Mercantile Company, a corporation, and said C. E. Wylie, receiver, as aforesaid, from selling or otherwise disposing of any of the property of said alleged bankrupt. The premises considered, they pray for an order enjoining and restraining the said Exploration Mercantile Company, a corporation, and C. E. Wylie, receiver as aforesaid, from disposing of said property, goods, wares and merchandise, or any part thereof.

E. E. ROBERTS,
ROBERT RICHARDS,
J. L. KENNEDY,
Attys. for Petitioners.

J. L. Kennedy says that he is one of the attorneys of record for the petitioners hereinbefore named, and that the statements contained in the foregoing petition are true, as he believes; that the reason this verification is not made by the petitioners is that each of the petitioners is a corporation duly organized and existing and having its principal place of business in the City and County of San Francisco, State of California, more than one hundred miles from the City of Carson, and that the deponent has been duly au-

thorized to make this verification.

J. L. KENNEDY.

Subscribed and sworn to before me by J. L. Kennedy this —— day of September, A. D. 1908.

[Seal] J. POUJADE,

Notary Public Within and for the County of Ormsby, State of Nevada."

State of Nevada." [52]

"In the District Court of the United States, in and for the District of Nevada.

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

And now, this 12th day of September, 1908, on motion of said attorneys, it appearing to the Court that there is danger of irreparable injury to the creditors of the said debtor, unless the acts sought to be enjoined is at once restrained, it is ordered that the above motion be heard at a session of said court, to be held at the City of Carson, on the 18th day of September, A. D. 1908, at 10 A. M.; and it is further ordered that, until the decision of this Court upon the said motion, the said parties against whom an injunction is prayed be restrained, and they are hereby commanded, under such penalties as are inflicted by the laws of the United States to abstain from the sale of, or in any other manner whatever disposing of, the property or estate or any part

thereof of the above-named Exploration Mercantile Company, a corporation.

E. S. FARRINGTON,
Judge."

That thereafter said orders were placed in the hands of the United States Marshal for the District of Nevada for service and were duly and regularly served by him at the times and in the manner set forth in said Marshal's return annexed to the writ of subpoena on file with the clerk of this Court, a copy of which said return is as follows, to wit:

"United States of America,
District of Nevada,—ss.

I hereby certify and return that I received the within writ together with a certified copy of the creditors' complaint, and that I served the same on W. C. Stone, personally, as the President of the Exploration Mercantile Company, at Goldfield, in said District, on the 14th day of September, 1908. I further certify and return that I served W. C. Stone personally, as the President of the Exploration Mercantile Company, with an order to Show Cause, a temporary restraining order and an injunction to stay suit, at Goldfield, in said district on the 14th day of September, 1908. I also certify and return that I served C. E. Wylie, personally, as the Receiver in charge of the Exploration Mercantile Company, with an injunction to stay suit and a temporary restraining order, at Goldfield, in said District, on the 14th day of September, 1908.

ROBERT GRIMMON,
U. S. Marshal.
By H. R. Mack, Deputy.

MARSHAL'S EXPENSES AND FEES.

7 services........................$ 28.00
Mileage on two writs, 345 miles each,
at 12¢...........................$ 82.80

$110.80"

That on said 14th day of September, 1908, service of said orders was admitted in writing, a copy of which writing is as follows, to wit:

"Service of the within subpoena, petition in bankruptcy, order to show cause, temporary restraining order, and the injunction to stay suit, this 14th day of September, 1908.

EXPLORATION MERCANTILE CO.
By W. C. STONE,
C. E. WYLIE, Receiver."

That on the 17th day of September, A. D. 1908, Thompson, Morehouse & Thompson filed their appearance as attorneys for the Exploration Mercantile Company, W. C. Stone and C. E. Wylie, receiver; that on the next day, at the time specified in said order and injunction, the said petitioning creditors [53] being represented in court by their counsel, a motion was made by said Thompson, Morehouse & Thompson, as such attorneys, to dissolve both of said restraining orders; that said motion was duly argued by the respective parties and submitted; and that said motion has never been decided; that said two orders have been at all times since their issuance, and now are, in full force and effect, and have not been modified; that on the 9th day of July, 1909, the Exploration Mercantile Company was duly ad-

judged a bankrupt on the ground that being then insolvent it did on the 6th day of August, 1908, apply for a receiver for its property; that at all times mentioned in said affidavit of P. F. Carney said C. E. Wylie was the vice-president of said Exploration Mercantile Company, and the receiver thereof appointed by said State Court; and that said C. E. Wylie knowingly, willfully and contemptuously violated said order and injunction against taking any further steps in the suit in said State Court in this, that he did, after the service of said orders upon him, knowingly, wilfully and contemptuously apply to said State Court on the 10th day of February, 1909, for an order permitting him as such receiver to sell the property of said Exploration Mercantile Company.

That said C. E. Wylie has also knowingly, wilfully and contemptuously violated said order restraining him from disposing of the property of the Exploration Mercantile Company, in this, that he did, after the service of the said orders upon him at divers times between the 30th day of September, 1908, and the 30th day of April, 1909, knowingly, wilfully and contemptuously pay out sums of money, the property of said Exploration Mercantile Company, aggregating $5,700.00, to wit, $3,000.00 to W. C. Stone, $1,000.00 to I. S. Thompson and H. V. Morehouse, $700.00 to Frank G. Hobbs, and $1,000.00 to himself; that Frank G. Hobbs at all times mentioned in said affidavit of P. F. Carney was the Secretary of said Exploration Mercantile Company, and that said Frank G. Hobbs has knowingly, wilfully and con-

temptuously violated said order restraining said C. E. Wylie from disposing of the property of said Exploration Mercantile Company, in this, that he did, after having actual notice and knowledge of said orders and the contents thereof, knowingly, wilfully and contemptuously counsel, advise, induce, aid and [54] abet said C. E. Wylie to violate said order, and did, after such knowledge and notice, knowingly, willfully and contemptuously receive from said C. E. Wylie, between the 1st day of October, 1908, and the 30th day of April, 1909, sums of money aggregating $700.00, the property of said Exploration Mercantile Company, and did retain said sums to his own use.

That Walter C. Stone, also known as W. C. Stone, at all times mentioned in said affidavit of P. F. Carney, was the President of said Exploration Mercantile Company, and that said Walter C. Stone has knowingly, wilfully and contemptuously violated said order restraining said C. E. Wylie from disposing of the property of said Exploration Mercantile Company, in this, that he did, after having actual notice and knowledge of said orders and the contents thereof, knowingly, wilfully and contemptuously counsel, advise, induce, aid and abet said C. E. Wylie to violate said order, and did, after such knowledge and notice, knowingly, wilfully and contemptuously receive from said C. E. Wylie, between the 1st day of October, 1908 and the 1st day of February, 1909, sums of money aggregating $3,000.00, the property of said Exploration Mercantile Company, and did retain said sums to his own use;

that said I. S. Thompson at all times mentioned in said affidavit of P. F. Carney was an attorney at law and a member of the law firm of Thompson, Morehouse & Thompson, and that said law firm was, at all said times, the attorneys for said Exploration Mercantile Company, said W. C. Stone and said C. E. Wylie, receiver; and that said I. S. Thompson has knowingly, wilfully and contemptuously violated said order and injunction against taking further steps in said suit in said State Court, in this, that he did as such attorney knowingly, wilfully and contemptuously counsel, advise, induce, aid and abet said C. E. Wylie to violate said last-named order and injunction and to apply to said State Court on the 10th day of February, 1909, for an order permitting said C. E. Wylie as such receiver to sell the property of said Exploration Mercantile Company.

That said I. S. Thompson did also knowingly, wilfully and contemptuously violate said order restraining said C. E. Wylie from disposing of the property of said Exploration Mercantile Comany in this, that he did, after having actual notice and knowledge of said orders and the contents thereof, knowingly, wilfully and contemptuously counsel, advise, induce, aid and abet said C. E. Wylie to violate said restraining order, and did, after such knowledge and notice, knowingly, wilfully and contemptuously receive from said C. E. Wylie, on the 7th day of December, 1908, the sum of $1,000.00, the property of said Exploration Mercantile Company, and did retain said sum to the use of said law firm.

That said H. V. Morehouse at all times mentioned

in said affidavit of P. F. Carney was an attorney at law and a member of the law firm of Thompson, Morehouse & Thompson, and that said law firm was, at all said times, the attorneys for said Exploration Mercantile Company, said W. C. Stone and said C. E. Wylie, receiver; and that said H. V. Morehouse has knowingly, wilfully and contemptuously violated said order and injunction against taking further steps in said suit in said State Court, in this, that he did [55] as such attorney knowingly, wilfully and contemptuously counsel, advise, induce, aid and abet said C. E. Wylie to violate said last-named order and injunction and to apply to said State Court on the 10th day of February, 1909, for an order permitting said C. E. Wylie as such receiver to sell the property of said Exploration Mercantile Company.

That said H. V. Morehouse did also knowingly, wilfully and contemptuously violate said order restraining said C. E. Wylie from disposing of the property of said Exploration Mercantile Company, in this, that he did, after having actual notice and knowledge of said orders and the contents thereof, knowingly, wilfully and contemptuously counsel, advise, induce, aid and abet said C. E. Wylie to violate said restraining order; and did, after such knowledge and notice, knowingly, wilfully and contemptuously receive from said C. E. Wylie, on the 7th day of December, 1908, in conjunction with said I. S. Thompson, the sum of $1,000.00, the property of said Exploration Mercantile Company, and did retain said sum to the use of said law firm. And as conclusions of law from the foregoing facts it ap-

pears to the court, and it so finds: That said C. E. Wylie, I. S. Thompson and H. V. Morehouse are, and each of them is, guilty of contempt of this court, in that they, and each of them, knowingly, wilfully and contemptuously disobeyed said order and injunction against taking further steps in said suit in the State Court, they, and each of them, having the power to obey said order.

That said C. E. Wylie, Frank G. Hobbs, Walter C. Stone, sometimes known as W. C. Stone, I. S. Thompson and H. V. Morehouse are, and each of them is, guilty of contempt of this court, in that they, and each of them, knowingly, wilfully and contemptuously disobeyed said order restraining said Exploration Mercantile Company and said C. E. Wylie, receiver, from disposing of the property of said Exploration Mercantile Company, they, and each of them, having the power to obey said order.

It is therefore ordered, adjudged and decreed that said C. E. Wylie is guilty of contempt of this court, in that he violated said order and injunction against taking any further steps in said suit in the State Court, and it is hereby further ordered; that said C. E. Wylie pay to the Clerk of this Court a fine of one dollar ($1.00) for the use of the Government [56] of the United States; that said payment be made within ten days after service upon him of a certified copy of this order, and that, unless such payment be so made by said C. E. Wylie, he stand committed to the county jail of the County of Ormsby, State of Nevada, until the payment of said fine, or until the further order of this Court.

It is further ordered, adjudged and decreed that said C. E. Wylie is guilty of contempt of this Court, in that he violated said order restraining him from disposing of any of the property of said Exploration Mercantile Company, and it is hereby further ordered that said C. E. Wylie pay to the Clerk of this Court a fine of One Thousand Dollars ($1,-000.00) for the benefit of the estate of said Exploration Mercantile Company, a bankrupt; that said payment be made within ten days after service upon him of a certified copy of this order, and that, unless such payment be so made by said C. E. Wylie, he stand committed to the county jail of the County of Ormsby, State of Nevada, until the payment of said fine, or until the further order of this Court.

It is further ordered, adjudged and decreed that said Frank G. Hobbs is guilty of contempt of this court, in that he violated said order restraining said C. E. Wylie from disposing of the property of said Exploration Mercantile Company, and it is hereby further ordered that said Frank G. Hobbs pay to the Clerk of this Court a fine of Two Hundred Dollars ($200.00) for the use of the Government of the United States; that said payment be made within ten days after service upon him of a certified copy of this order, and that, unless such payment be so made by said Frank G. Hobbs, he stand committed to the county jail of the County of Ormsby, State of Nevada, until the payment of said fine, or until the further order of this Court.

It is further ordered, adjudged and decreed that said Walter C. Stone, also known as W. C. Stone,

is guilty of contempt of this Court, in that he violated said order restraining said C. E. Wylie from disposing of the property of said Exploration Mercantile Company, and it is hereby further ordered that said Walter C. Stone, also known as W. C. Stone, pay to the Clerk of this Court a fine of Three *Thousand ($3,000.00)* for the benefit of the estate of said Exploration Mercantile Company, a bankrupt; that said [57] payment be made within ten days after service upon him of a certified copy of this order, and that, unless such payment be so made by said Walter C. Stone, he stand committed to the County Jail of the County of Ormsby, State of Nevada, until the payment of said fine, or until the further order of this Court.

It is further ordered, adjudged and decreed that said I. S. Thompson is guilty of contempt of this Court, in that he violated said order and injunction against taking further steps in said suit in the State Court, and it is hereby further ordered that said I. S. Thompson pay to the Clerk of this Court a fine of One Dollar ($1.00) for the use of the Government of the United States; that said payment be made within ten days after service upon him of a certified copy of this order, and that unless such payment be so made by said I. S. Thompson, he stand committed to the County Jail of the County of Ormsby, State of Nevada, until the payment of said fine, or until the further order of this Court.

It is further ordered, adjudged and decreed that said I. S. Thompson is guilty of contempt of this Court, in that he violated said order restraining said

C. E. Wylie from disposing of any of the property of said Exploration Mercantile Company, and it is hereby further ordered that said I. S. Thompson pay to the Clerk of this Court a fine of Five Hundred Dollars ($500.00); that thereupon said Clerk pay to the creditors prosecuting these contempt proceedings said sum as partial compensation for their expenses, costs and attorneys' fees herein; that said payment be made by said I. S. Thompson within ten days after service upon him of a certified copy of this order, and that unless such payment be so made by said I. S. Thompson, he stand committed to the county jail of the County of Ormsby, State of Nevada, until the payment of said fine, or until the further order of this Court.

It is further ordered, adjudged and decreed that said H. V. Morehouse is guilty of contempt of this Court, in that he violated said order and injunction against taking further steps in said suit in the State Court, and it is hereby further ordered that said H. V. Morehouse pay to the Clerk of this Court a fine of One Dollar ($1.00) for the use of the Government of the United States. [58]

That said payment be made within ten days after service upon him of a certified copy of this order, and that, unless such payment be so made by said H. V. Morehouse, he stand committed to the County Jail of the County of Ormsby, State of Nevada, until the payment of said fine, or until the further order of this Court.

It is further ordered, adjudged and decreed that said H. V. Morehouse is guilty of contempt of this

court, in that he violated said order restraining said C. E. Wylie from disposing of any of the property of said Exploration Mercantile Company, and it is hereby further ordered:

That said H. V. Morehouse pay to the Clerk of this Court a fine of Five Hundred Dollars ($500.00); that thereupon said Clerk pay to the creditors prosecuting these contempt proceedings said sum as partial compensation for their expenses, costs and attorneys' fees herein; that said payment be made by said H. V. Morehouse within ten days after service upon him of a certified copy of this order, and that, unless such payment be so made by said H. V. Morehouse, he stand committed to the County Jail of the County of Ormsby, State of Nevada, until the payment of said fine, or until the further order of this Court. Done in open court this 12th day of April, A. D. 1912.

E. S. FARRINGTON,
Judge.

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, Bankrupt. And the Application of P. F. Carney in said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Order Adjudging Guilty of Contempt. Filed April 12, 1912, at 10 min. past 10 o'clock A. M. T. J. Edwards, Clerk. J. L. Ken-

nedy, Attorney at Law, 325 Grant St., Eureka, Calif. [59]

[Opinion on Merits.]

In the District Court of the United States, in and for the District of Nevada.

No. 103.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, an Alleged Bankrupt.

DETCH & CARNEY, J. L. KENNEDY, ROBERT, RICHARDS & FOWLER, for Petitioning Creditors.

THOMPSON, MOREHOUSE & THOMPSON, for Defendant.

FARRINGTON, District Judge.

A jury having found that the Exploration Mercantile Company committed an act of bankruptcy by applying for a receiver while it was insolvent, a motion is now made in arrest of adjudication because of the alleged insufficiency of the creditors' petition.

It is averred in the amended petition that "at the date of filing the original petition herein, to wit, September 12th, 1908, for more than four months continuously next prior thereto and ever since said time, the aggregate of said Exploration Mercantile Company's property, at a fair valuation, amounted to less than the sum of Sixty Thousand Dollars, and that at all the said times its debts were in excess of Seventy-four Thousand Dollars."

This is a sufficient allegation that the Exploration Mercantile Company was insolvent August 6th, 1908, when an application was made to the State Court for appointment of a receiver for the property of the company.

It is next alleged that the entire capital stock of the company consists of 50,000 shares of the par value of one dollar each, of which W. C. Stone owns 48,000 shares, F. G. Hobbs 1,000 shares and C. E. Wylie 1,000 shares; that these three persons not only owned all the capital stock, but they constituted the entire board of directors of said corporation, Stone being its president, Wylie its vice-president, and Hobbs its secretary and treasurer; that these three persons conspired and agreed to evade the provisions of the bankrupt act, and to prevent creditors from obtaining a knowledge of the company's affairs, and from participating in the choice of a trustee; to hinder, delay and defraud the creditors of the company, and to force [60] them to accept less than the full amount of their claims; "that in pursuance of said conspiracy and agreement said directors and officers, acting for and on behalf, and as the act and deed, of said corporation, which was then and there insolvent as aforesaid, on the 6th day of August, A. D. 1908, caused to be filed in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, an application praying for the appointment of a receiver with a view to the dissolution of said corporation." The petition so caused to to be filed was presented by the said W. C. Stone.

It was averred therein that the assets of the company amounted to $95,000, while its liabilities were but $65,000; that owing to depressed conditions in business and the difficulty of making collections, the assets of the company were in danger of being wasted through attachment or litigation; that the plaintiff Stone is the holder of more than one-tenth of the capital stock of the corporation, and "that said corporation should be dissolved and that a receiver should be appointed to take charge of the business and affairs of said corporation, that its property may be preserved, its creditors paid, and its assets cared for." The prayer, in substance, was that a receiver be appointed to manage the affairs of the company with a view to its dissolution. The creditors' petition also alleged that on the same day, August 6th, 1908, the above-mentioned petition was filed, summons was issued, on which said Wylie, in pursuance of said conspiracy, and as the act of said corporation, endorsed an admission of service; that on the same day the said directors and officers, as the act of said corporation, caused to be filed in said court and cause an appearance and application for the appointment of a receiver of the property of said company. Said appearance reads in part as follows: "W. C. Stone, Plaintiff, vs. Exploration Mercantile Company, a Corporation, Defendant. Now comes C. E. Wylie, manager and one of the directors of the above-named defendant, and enters the appearance of the said defendant in the above-entitled cause, and asks the above-entitled Court to appoint as receiver of said defendant C. E. Wyle, the under-

signed, one of the directors of said corporation. C. E. Wylie, Manager and Director of the Exploration Mercantile Company."

It is further alleged in the creditors' petition that on the same day [61] "the directors and officers of said Exploration Mercantile Company, a corporation, acting for and on behalf, and as the act and deed of said corporation, which was then and there insolvent as aforesaid, moved the said State Court upon the said pleadings as above set forth, for an order, and said State Court, on said day made its order appointing said C. E. Wylie receiver," etc. On the following day said Wylie entered upon the duties of his office as such receiver. That on September 8th, 1908, and at other times, said Stone, in pursuance of said conspiracy, and as the act of said corporation, sought to settle claims against it for sixty cents on the dollar; that ever since August 6th, 1908, said directors and officers have refused, and still refuse, petitioners access to the books of the company, and at all times have refused to permit petitioners' representatives to take or assist in taking an inventory of the property of the corporation. Near the end of the creditors' petition is this statement: "Ever since said 6th day of August, A. D. 1908, said Exploration Mercantile Company, a corporation, and each and all of said directors and officers have acquiesced in, upheld, ratified and confirmed the said proceedings and application for, and appointment of, said receiver, as aforesaid; and said Frank G. Hobbs has ratified and confirmed the same and has since been continuously in the employ of said receiver." The

petition concludes with a prayer that the Exploration Mercantile Company be adjudged bankrupt."

This petition having been filed, within due time thereafter the alleged bankrupt filed its answer, demanding a trial by jury. By consent of both parties the following issues in the form here set out were submitted to the jury:

"Whether on the 6th day of August, 1908, the date of the appointment of C. E. Wylie, as receiver of the Exploration Mercantile Company, by the District Court of the First Judicial District of the State of Nevada in the case of W. C. Stone vs. Exploration Mercantile Company, the aggregate of the property of the said Exploration Mercantile Company was, at a fair valuation, sufficient in amount to pay its debts."

"Whether on the 12th day of September, 1908, the date of the filing of the petition in bankruptcy in these proceedings, the aggregate of the [62] property of said Exploration Mercantile Company was, at a fair valuation, sufficient in amount to pay its debts."

"Whether, on the 6th day of August, A. D. 1908, the Exploration Mercantile Company, being insolvent, applied for a receiver for its property." The jury, after having heard the evidence and listened to the instructions of the Court, returned a negative answer to the first and second interrogatories, and an affirmative answer to the third.

Among the grounds urged in arrest of judgment and of the order of adjudication, there is no intimation that the verdict is not sustained by the evi-

dence. The several grounds may be resolved into one comprehensive objection; the creditors' petition fails to show that defendant was guilty of an act of bankruptcy in this, that it fails to show that defendant applied for a receiver for its property. It is contended that the petition not only fails to show that the corporation applied for a receiver, but under the Nevada statute it was and is impossible for any Nevada corporation to make such an application. Section 7 of the General Incorporation Law of Nevada (Stats. 1903, p. 121) provides that every corporation created under the provisions of this act shall have power "To wind up and dissolve itself, or to be wound up and dissolved in the manner hereinafter mentioned."

The power granted is the power "to wind up and dissolve itself or to be wound up and dissolved in the manner hereinafter mentioned." It is the winding up and dissolution of the corporation which is provided for. There is no attempt to circumscribe or limit the power to ask the appointment of a receiver. Receivers are frequently asked and appointed for corporation when there is no thought of dissolution. Section 89 of the act provides a method of dissolution by voluntary action of the stockholders, officers and creditors. Section 94, under which the proceedings in this case were had, provides for winding up a corporation by the Court, and reads as follows:

Receiverships and Dissolution by the Court.

Sec. 94. Whenever a corporation has in ten successive years failed to pay dividends amounting in all to five per cent of its entire outstanding

capital, or has willfully violated its charter, or its trustees or directors have been guilty of fraud or collusion of gross mismanagement in the conduct or control of its affairs, or its assets are in danger of waste through attachment, **[63]** litigation, or otherwise, or said corporation has abandoned its business and has not proceeded diligently to wind up its affairs, or to distribute its assets in a reasonable time, or has become insolvent and is not about to resume its business with safety to the public, any holder or holders of one-tenth of the capital stock may apply to the District Court, held in the district where the corporation has its principal place of business, for an order dissolving the corporation and appointing a receiver to wind up its affairs, and may by injunction restrain the corporation from exercising any of its powers or doing any business whatsoever, except by and through a receiver appointed by the Court. Such Court may, if good cause exist therefor, appoint one or more receivers for such purpose, but in all cases directors or trustees who have been guilty of no negligence nor active breach of duty shall have the right to be preferred in making such appointment, and such Court may at any time, for sufficient cause, make a decree dissolving said corporation and terminating its existence.

Subsequent sections provide for notice to creditors, presentation of claims to the receiver within a limited time, the barring of claims not so presented, the sale of property and the distribution of assets.

Although the act does not provide for the discharge of the debtor, and is not so entitled, it is essentially an insolvency act. The winding up of the corporation discharges its debts.

"An insolvent law is a law for the relief of creditors by an equal distribution among them of the assets of the debtor, but does not necessarily involve the discharge of the debtor."

Harbough, Assignee, vs. Costello, 184 Ill. 110;
In re Merchants' Ins. Co., 17 Fed. Cas. No. 9441;
Moody vs. Development Co., 102 Me. 365;
Salmon vs. Salmon, 143 Fed. 395.

"In so far as the person and the subject matter falls within the jurisdiction of the bankrupt act and is within the jurisdiction of the bankrupt court, the State insolvency law is superseded and cannot be invoked."

Littlefield vs. Gay, 96 Me. 423;
Westcott & Co. vs. Barry, 69 N. H. 505;
In re Curtis, 91 Fed. 737.

In the absence of statutory authority courts of equity have no power to wind up the affairs of a corporation.

Beach on Receivers, sec. 86.

But when from any cause the property of a corporation is in imminent danger of waste or destruction and a receivership is necessary and there is no other adequate relief, a court of equity has inherent power to appoint a receiver to take charge of the corporate assets and affairs; but this power is to preserve and not to dissolve a corporation, and as soon as the necessity for such supervision ceases,

the court must lift its hands and retire.

Beach on Receivers, sec. 421.

The doctrine that a receiver cannot be appointed for corporate property on application of the corporation itself applies quite as strongly to [64] persons as to corporations.

17 Ency. Pl. & Pr., p. 687.

If the rule not only forbids the appointment, but also renders it impossible for a debtor to apply for the appointment of a receiver over his own property, why did Congress declare it an act of bankruptcy for a person being insolvent to apply for a receiver? It is unreasonable to suppose that Congress would proscribe an act which no one can commit. There is a difference between asking and receiving; between the application for and the granting of a receivership. A corporation through its officers may apply for relief which a court may properly and justly refuse, or which it has no power to grant. When a person who is actually insolvent applies for a receiver for his property, the act of bankruptcy is committed, and this is so irrespective of any action which may be had in the court to which the application is made. The application is in itself an admission that the debtor's affairs require supervision.

The fact that certain powers are conferred by statute upon corporations does not mean that a corporation is unable to perform any act beyond the scope of such enumerated powers. The statute restricts the authority of the corporation and fixes the limits beyond which its acts are unlawful and

in excess of the powers conferred. If it were otherwise a corporation could not be guilty of an *ultra vires* act, a tort, or a misdemeanor. Corporations commit wrongful, unlawful and even criminal acts, and they are held responsible therefor, even though the act is not the formal act of the corporation.

United States vs. McAndrews & Forbes Co., 149 Fed. 823, 835;

Clark on Corp., sec. 63.

"There may be actual corporate conduct," says the Court in People vs. North River Sugar-Refining Co., 121 N. Y. 582, 619, "which is not formal corporate action; and where that conduct is directed or produced by the whole body, both of officers and stockholders, by every living instrumentality which can possess and wield the corporate franchise, that conduct is of a corporate character, and, if illegal and injurious, may deserve and receive the penalty of dissolution."

A corporation is an association of natural persons united as one body [65] and endowed by law with the capacity to act in many respects as an individual, as a separate and distinct entity, but a corporation can only act or think or purpose through its officers, directors or stockholders. It is inconceivable that a corporation should form or carry into effect any design which is contrary to the wishes of its directors, officers and stockholders; it exists to carry out their purposes and their plans. The conception that a corporation is a legal entity existing separate, apart and distinct from the natural persons who compose it is a fiction which has been introduced

for convenience in making contracts, acquiring property, suing and being sued, and to secure limited liability on the part of stockholders.

"It is a certain rule," says Lord Mansfield, Chief Justice, "that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted."

Johnson vs. Smith, 2 Burr. 962;
Wood vs. Ferguson, 7 Ohio St. 29;
Clark on Corp., p. 9.

The fiction of a corporate entity was never invented to promote injustice or fraud, and when it is used for such a purpose it should be disregarded, and the actual fact should be ascertained.

In re Rieger, Kapner & Altman, 157 Fed. 609, 613;
Bank vs. Trebien, 59 Ohio St. 316;
State vs. Standard Oil Co., 15 L. R. A. 145, 153, 34 L. R. A. 541;
People vs. N. R. S. R. Co., 121 N. Y. 582, 613;
United States vs. Milwaukee etc. Co., 142 Fed. 247, 252;
Holbrook, Cabot & Rollins Corp. vs. Perkins, 147 Fed. 166, 169;
Cawthra vs. Stewart, 109 N. Y. S. 770;
U. S. & Mexican Trust Co. vs. Delaware etc. Co., 112 S. W. 447, 460;
Southern E. S. Co. vs. State, 44 So. Rep. 785, 790; 7 Am. & Eng. Ency. L. 633, 634;
1 Cook on Corp. (5 ed.), p. 27.

"For certain purposes the law will recognize the

corporation as an entity distinct from the individual stockholders; but that fiction is only resorted to for the purpose of working out the lawful objects of the corporation. It is never resorted to when it would work an injury to any one, or allow the corporation to perpetrate a fraud upon anybody."

The Sportsman Shot Co. vs. American S. & L. Co., 30 Wkly. Law Bul. 87.

In United States vs. Milwaukee Refrigerator Transit Co. et al., 142 Fed. 247, 255, it was charged that the Transit Company was a dummy corporation organized, owned and operated by the stockholders of the Brewing Company as a device to cover the receipt of rebates on interstate shipments of beer. After an exhaustive examination of the authorities, the Court [66] stated the principle thus:

"If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

In Re Reiger et al., 157 Fed. 609, a proceeding in bankruptcy, the bankrupts were copartners; in the course of their business they had bought 99 per cent of the outstanding stock of a corporation, the remaining shares being held by relatives of one of the copartners. Receivers having been appointed for the partnership assets, an application was made to

extend the receivership to the property of the corporation. It was charged that the bankrupts having abandoned the partnership business, were still in control of the business and property of the corporation, and if permitted to remain in control they would remove and dispose of it. The Court held that all the property of the corporation belonged to the copartners, and entirely ignored the fact that the property belonged to a corporation. The Court said:

> "The fiction of legal corporate entity cannot be so applied by the partners as to work a fraud on a part of their creditors, or hinder and delay them in the collection of their claims, and thus defeat the provisions of the bankruptcy act. The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not in a proper case ignore it to preserve the rights of innocent parties or to circumvent fraud."

In Bank vs. Trebein Co., 59 Ohio St. 316, 326, a failing debtor formed a corporation composed of himself and certain members of his family, to which he transferred all his property in exchange for stock of which he received substantially all. He immediately placed all his stock, except one share, with certain of his creditors as security for their claims, and then as president and general manager of the corporation, retained the control and management of the property and business which he had before the corporation was formed. The Court declared the corporation, in substance another Trebein, saying:

"The fiction by which an ideal legal entity is attributed to a duly formed incorporated company, existing separate and apart from the individuals composing it, is of such general utility and application, as frequently to induce the belief that it must be universal, and be, in all cases adhered to, although the greatest frauds may thereby be perpetrated under the fiction as a shield. But modern cases, sustained by the best text-writers, [67] confine the fiction to the purposes for which it was adopted—convenience in the transaction of business and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members; and have repudiated it in all cases where it has been insisted on as a protection to fraud or any other illegal transaction."

In Cawthra vs. Stewart, 109 N. Y. S. 770, Stewart owned 98 share of the capital stock of a corporation known as L. C. Stewart & Co., and controlled the other two shares. Cawthra, induced by false representations made by Stewart, who was then a director of the company and its president, invested $3,000 in the corporate business and received half the stock. Suit was brought against Stewart and the Company to rescind the stock contract and recover the amount paid. The corporation demurred that it was a distinct, definite entity, and not liable for any acts of Stewart which it had not authorized. The Court said:

"Strictly speaking, such terms as 'authority' and 'ratification' and others which imply separate

personalities are inappropriate. We do not have a case of agency, but of identity. It cannot properly be said that the corporation could clothe Stewart with authority any more than that Stewart could clothe himself with authority. He was the corporation and it was only another form of him. Whatever he did with respect to the matters he was handling under the guise of a corporation was the act of the corporation."

In the case of State vs. Standard Oil Co., 15 L.R.A., 145, it appears that the stockholders in various corporations and a number of copartnerships interested in the oil business agreed to transfer their interests in their several properties, and all their corporate stock, to certain trustees; they were to receive in lieu thereof trust certificates equal in par value to the stock which they surrendered. There was no act on the part of the corporation, no formal act, it was simply the act of the stockholders of these various corporations, and of course that meant all the officers and the directors. It was held that this action of the stockholders was, under the circumstances, to be regarded as the act of the corporation. The following extract is from the opinion:

"Applying, then, the principle that a corporation is simply an association of natural persons, united in one body under a special denomination, and vested by the policy of the law with the capacity of acting in several respects as an individual, and disregarding the mere fiction of a separate legal entity, since to regard it in an inquiry like the one before us would be subversive of the pur-

pose for which it was invented, is there, upon an analysis of the agreement, room for doubt that the act of all the stockholders, officers and directors of the company in signing it should be imputed to them as an act done in their capacity as a corporation? We think not, since thereby all the property and business of the company is, and was [68] intended to be, virtually transferred to the Standard Oil Trust, and is controlled through its trustees, as effectually as if a formal transfer had been made by the directors of the company. On a question of this kind, the fact must constantly be kept in view that the metaphysical entity has no thought or will of its own; that every act ascribed to it emanates from and is the act of the individuals personated by it; and that it can no more do an act, or refrain from doing it, contrary to the will of these natural persons, than a house could be said to act independently of the will of its owner, and, where an act is ascribed to it, it must be understood to be the act of the persons associated as a corporation, and, whether done in their capacity as corporators or as individuals must be determined by the nature and tendency of the act. It therefore follows, as we think, from the discussion we have given the subject, that where all, or a majority, of the stockholders comprising a corporation to do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property

and business of the company, in the same manner as if it had been a formal resolution of its board of directors, and the act so done is *ultra vires* of the corporation and against public policy, and was done by them in their individual capacity for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation; and, to prevent the abuse of corporate power, may be challenged as such by the State in a proceeding in *quo warranto.*"

While the motion now under consideration rests upon the alleged insufficiency of the creditors' petition, it may not be amiss to consider how completely certain allegations of the petition are supported and illustrated by the evidence.

The creditors were refused access to the books. Even after proceedings in the State Court were commenced the books were withheld and the creditors informed if they wished to see the accounts they must procure an order from that court. Mr. Ruhl was directed by the State Court to expert the books, but even he, armed with this authority, was not permitted to examine all of them; the accounts of Mr. Stone were withheld, and but a semblance of full exhibition was had. An order to produce books and papers was required in this court in addition to the subpoena *duces tecum.* A number of leaves were torn from the journal by Mr. Stone, and either lost or destroyed. Mr. Stone gives as an excuse for such mutilation of the journal that the agent of Bradstreet insisted on seeing the books. In the merchandise account only those purchases of mer-

chandise were recorded for which cash payments had been made. Credit purchases of merchandise were not shown by that account, and could be ascertained only by examination of the various statements which accompanied each purchase. Obviously books kept in such a manner do not show liabilities; they conceal the real conditions. [69]

An auto account, an account with Mr. Pryor, and a very active stock and commission account show frequent and considerable investments of Exploration Mercantile Company money. These, the bookkeeper Mr. Hobbs, stated were really accounts of Mr. Stone. The transfers into Mr. Stone's personal account were shown, if at all, on the destroyed journal leaves. The detached ledger leaves showing Mr. Stone's personal account were withheld from examination until an order for production of books and papers were made in this Court during the progress of the trial. An entry made December 31st, 1907, credits Mr. Stone with wages, $36,000, and rent $12,000; total $48,000. In reference to these matters Mr. Hobbs testifies as follows:

"(By Mr. CARNEY.)

Q. I will ask you to examine Petitioners' Exhibit No. 9, being the journal, on page 31, under the head of 'Profit and Loss,' and 'Rent,' what was the amount of rent for that store building during the year 1906? A. $3,600.

Q. That is at the rate of $300 per month?

A. Yes, sir.

Q. That entry was made by yourself?

A. It was.

Q. As the treasurer of the corporation?

A. Yes, sir.

Q. I will ask you to examine this sheet known as 'Account Walter C. Stone,' on December 31, 1907 (Hands to witness), for $12,000; when was that $12,000 placed thereon, the figures?

A. When was it placed there?

Q. Yes. A. On December 31st, 1907.

Q. 1907? A. Yes.

Q. I will ask you to examine an item known as 'Sundries' on December 31st, 1907, being an amount of $55,801.50. A. Yes, sir.

Q. What does that include?

A. I could not tell unless I had the journal page for that, Journal 50, or I could get it from the ledger with time, it will take a little time to figure those things.

Q. This is the journal, is it not? (Hands book to witness.) A. Yes, sir, that page is missing.

Q. That has reference to the page that is missing, has it? A. Yes, sir.

Q. And those pages that are missing included these items of accounts? A. The journal entries.

Q. Have you any idea what that fifty-five thousand odd dollars is for?

A. I have an idea, but I could not give it to you unless I could look over the ledger records, I could get it from that.

Q. I will ask you to look at [70] the item of December 31st, 'Wages to date, $36,000.'

A. Yes, sir.

Q. When was that entry made?

A. December 31st, 1907.

Q. $36,000? A. Yes, sir.

Q. I wish you would examine that paper and see if that was not $12,000?

A. It has been changed, or the journal record was changed at that particular time, at that same time.

Q. It had been changed at that time?

A. Yes, it was changed at that time.

Q. There has been considerable diligence on your part, on Mr. Stone's part and on Mr. Wylie's part since the filing of this petition in bankruptcy to show by the books that this institution was solvent on the 6th day of August 1908, has there not?

A. Yes, sir.

Q. I will ask you to look at the footings of $87,-439.89, and ask you whether or not those footings have not been changed?

A. The book records were changed at that particular time.

Q. They were changed from $12,000 to $36,000?

A. I don't know what the changes were; I would not state what the change was, but I remember of making that change myself; I made it.

The COURT.—When did you say that change was made?

A. At the time of entry.

Q. (Mr. CARNEY.) When was the entry made?

A. December 31st, 1907.

Q. Do you know what wages Mr. Stone received?

A. The wages, no, unless I could figure it up.

Q. What was his salary as the president of the corporation?

A. I could not tell you unless I figured it up from the ledger.

Q. Have you no recollection as to what Mr. Stone drew as an officer of that corporation for a salary?

A. It went in as a lump sum, I believe, at that particular time.

Q. As a matter of fact, Mr. Stone never received more than $300 per month, did he during 1906, as wages? A. I don't remember, I could not tell.

Q. Did you ever have any meeting as to what wages Mr. Stone should receive as an officer of this corporation? A. Yes, sir.

Q. When was that meeting?

A. At the time this entry was made, I think, some time around there.

Q. Are there any records of it in the minute-book of the Exploration Mercantile Company?

A. I think so.

Q. Will you kindly produce them? [71]

A. I am not absolutely certain, I think there was.

Q. I hand you the minute-book of the corporation (hands to witness), do you find any memorandum there?

A. It says, 'Meeting of the Board of Directors of the Exploration Mercantile Company. This meeting of the Board of Directors held on the 2d day of January, 1908, in the office of the company, present, W. C. Stone, Frank G. Hobbs, C. E. Wylie. At this meeting the Board examined the books of the corporation kept by its secretary, Frank G. Hobbs, and the balance struck by him, and on motion it was resolved that the said accounts are correct,

and the balances are true, and that the same be and hereby are adopted and affirmed.'

Q. Those are minutes placed there by typewriting?

A. Yes, sir, these are typewritten minutes.

Q. Where were they prepared?

A. I don't know."

The reasons why Messrs. Stone, Wylie and Hobbs objected to an examination of the books are obvious. There is some testimony to the effect that Mr. Hobbs and Mr. Wylie objected to the petition presented by Mr. Stone in the State Court, but in the light of their conduct I am satisfied their objections were not serious. The refusal to permit examination of the books, and the adoption and use of a method of book-keeping which tended to conceal the real condition of the business, were calculated to hinder and delay creditors. In this Messrs. Stone, Wylie and Hobbs participated. The conduct of each of them indicates that he knew there was something to be concealed from the creditors, and also that he knew the concern was insolvent. They seem to have agreed upon Mr. Stone's salary after the services had been rendered. The term of service could not have exceeded two years, for which they fixed a salary of $18,000 per year. During a portion of these two years Mr. Stone was travelling in Europe and China.

Is it reasonable to suppose that a concern having a total capital stock of $50,000, paying its president a salary of $18,000 per year and a rent of $12,000 per year can be operated at a profit? The evidence is very conclusive that each of the three men knew the business was running behind, and wished to con-

ceal that fact. When the creditors were about to commence attachment suits, Mr. Stone, who had received the $48,000 credit, who had [72] mutilated the journal, who had withheld his own account from examination, who was then the actual owner of 96 per cent of the stock of the concern, filed in the State Court a petition asking that Court to wind up the corporation, and place its property in the hands of a receiver because litigation was threatened and the assets were likely to be wasted. Mr. Wylie, general manager of the corporation, immediately appeared in court and filed an admission of service for the corporation, and a request that he himself be appointed receiver. This proceeding in the State Court was certainly in harmony with the previous and subsequent conduct of the three men; it was but a part of a scheme to hinder and delay and therefore to defraud the creditors of the Exploration Mercantile Company, and the scheme was participated in, and consistently pushed and carried out by all the officers of the corporation, by its president, secretary and treasurer, general manager, and directors, and by all its stockholders.

It is alleged, and the testimony shows, that all the directors, officers and stockholders of the Exploration Mercantile Company, as the act and deed of the corporation, caused the Stone petition to be filed and a receiver to be asked for, and later that they, in behalf of said corporation, as its act and deed, moved the court for an order appointing Wylie receiver. It is also averred that the corporation ratified the act. It is also alleged, and amply proven

by the testimony, that this was all done to hinder, delay and defraud its creditors; and it is clear from the testimony that these persons, Stone, Wylie and Hobbs, knew the corporation was insolvent at the time the receiver was applied for. Under the shelter of a receivership, which tied the hands of the creditors, they proposed themselves to control its business and conceal its actual condition. Inasmuch as all the stockholders, all the officers and all the directors of this corporation, without exception, are using the distinction between themselves and the corporate entity for the purpose of hindering, delaying and defrauding creditors, that distinction should be disregarded, and the act of applying for a receiver should be imputed to the corporation itself. The motion in arrest of judgment is denied, and the usual adjudication of bankruptcy will be entered. **[73]**

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, an Alleged Bankrupt. Opinion. Filed July 9th, 1909. T. J. Edwards, Clerk. **[74]**

[Opinion on Contempt Proceedings]

In the District Court of the United States in and for the District of Nevada.

In the Matter of the EXPLORATION MERCANTILE COMPANY (a Corporation), Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court,

of Date July 9th, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson, and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

J. L. KENNEDY, DETCH & CARNEY, E. E. ROBERTS, for Petitioning Creditors.

GEORGE S. GREEN, H. V. MOREHOUSE, for Respondents.

FARRINGTON, District Judge.

August 6th, 1908, W. C. Stone, who was then president and a stockholder and director of the Exploration Mercantile Company, caused to be filed in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, an application praying for the appointment of a receiver to take charge of the affairs of said corporation, with a view to its dissolution, under the directions and orders of that Court. On the same day C. E. Wylie, who was then manager of said company, and one of its directors and stockholders, appeared in said court, and asked in behalf of the corporation that he be appointed such receiver. Thereupon an order was made declaring said corporation dissolved, and appointing Wylie receiver, with full power to take charge of its assets, and to control its business. Wylie qualified at once, and immediately took possession of the property, and began to carry on the business. At the time this application was made the Exploration Mercantile Company was, and ever since has been, insolvent. Five weeks later, on the 12th day of September, 1908,

a petition was filed in this court by certain creditors of the company, praying that it be adjudged a bankrupt. On the same day the same creditors [75] presented a verified petition, in which it was alleged that the Exploration Mercantile Company had a large stock of merchandise, which would be dissipated and lost, to their irreparable injury, unless said company and C. E. Wylie, receiver, were restrained from selling or otherwise disposing of it. Accordingly, an order was made by this Court in the following terms:

"And now, this 12th day of September, 1908, on motion of said attorneys, it appearing to the Court that there is danger of irreparable injury to the creditors of the said debtor, unless the act sought to be enjoined is at once restrained, it is ordered that the above motion be heard at a session of said court, to be held at the City of Carson, on the 18th day of September, A. D. 1908, at 10 A. M.; and it is further ordered that, until the decision of this court upon the said motion, the said parties against whom an injunction is prayed be restrained, and they are hereby commanded, under such penalties as are inflicted by the laws of the United States, to abstain from the sale of, or in any other manner whatever disposing of the property or estate or any part thereof of the above-named Exploration Mercantile Company, a corporation."

A third petition also was filed, on the 12th day of September, 1908, alleging (1) that a petition in bankruptcy had been filed; (2) that proceedings had been had in the state court resulting in the appointment of C. E. Wylie as receiver, who was then conducting

the business of said bankrupt; and (3) "that if the said suit is not stayed great injury will be done to your petitioners and the estate of the Exploration Mercantile Company, a corporation, to be administered in bankruptcy herein." The prayer was that the suit in the State court be stayed and that the company, W. C. Stone and C. E. Wylie, and their agents, servants and counselors, be restrained from further prosecuting said suit. This was followed by an injunction in the following words:

"United States of America,
District of Nevada,—ss.

The President of the United States of America, to W. C. Stone, C. E. Wylie and Exploration Mercantile Company, a Corporation, Greeting:

Whereas, a petition has been filed on the bankruptcy side of the District Court of the United States for the District of Nevada, praying for an injunction to restrain the prosecution of a certain suit pending in the District Court of the First Judicial District, in and for the County of Esmeralda, in which said W. C. Stone is plaintiff and Exploration Mercantile Company is defendant, and has obtained an allowance for an injunction, as prayed for in said petition from the District Court of the United States for the District of Nevada: Now, therefore, we, having regard to the matters in said petition contained, do hereby command and strictly enjoin you, the said W. C. Stone, C. E. Wylie and Exploration Mercantile Company, a corporation, or either of you, and each of your agents, servants, at

torneys or counselors from further prosecuting said suit in said court, and from taking any further step or proceeding in said action or suit now pending as aforesaid, which commands and injunctions you are respectively required to observe until our said District Court shall make further order in the premises. Hereof, fail not, under the penalty of the law thence issuing.

Witness, the Honorable E. S. FARRINGTON, District Judge of the United States for the District of Nevada, this 12th day [76] of September, A. D. 1908, and in the hundred and thirty-third of the Independence of the United States of America.

[Seal] T. J. EDWARDS,
Clerk of said Court."

September 17th, 1908, Thompson, Morehouse & Thompson filed their appearance at attorneys for the Exploration Mercantile Company, W. C. Stone and C. E. Wylie, receiver. The company filed a demurrer to the petition for adjudication, and W. C. Stone presented a plea to the jurisdiction. On the following day, a motion was made by the company to dissolve the injunction. The motion was supported by affidavit of Frank G. Hobbs, one of the directors of the company. This motion has never been decided. On the 9th day of July, 1909, the Exploration Mercantile Company was duly adjudged a bankrupt on the ground that being then insolvent, it did on the 6th day of August, 1908, apply for a receiver for its property. On the same day, on petition of the petitioning creditors, supported by affidavit of P. F. Carney, the court ordered W. C. Stone,

C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to show cause why they should not be adjudged guilty of contempt for disobedience of the foregoing order and injunction. Respondents then took the matter to the Circuit Court of Appeals. Their petition to review the order citing them to show cause was dismissed, for, as that Court held "an order to show cause why petitioner should not be punished for contempt for violating an injunction of the court of bankruptcy in a collateral matter is not a 'proceeding in bankruptcy' subject to review on an original petition."

Morehouse vs. Pacific Hardware & Steel Co., 177 Fed. 337.

And the order of adjudication was affirmed.

Exploration Mercantile Co. vs. Pacific Hardware & Steel Co., 177 Fed. 825.

The affidavit of P. F. Carney, filed July 9th, 1909, charged that said orders and injunctions issued September 12th, 1908, had been violated, subsequent to service of said order, by various disposals of the moneys and property of the Exploration Mercantile Company as follows: 1. Between September 30th, 1908, and April 30th, 1909, C. E. Wylie, vice-president and receiver of said corporation, paid out more than $10,000; and 2. Appropriated to his own use more than $1,000. 3. The said Wylie as receiver, on the 10th day of February, 1909, applied to said State court for an order [77] permitting him to sell the property of said corporation. 4. W. C. Stone, president of said corporation, demanded and received $3,000 from said

C. E. Wylie between October 6th, 1908, and January 20th, 1909. 5. Frank G. Hobbs, secretary of said corporation, between October 1st, 1908, and April 30th, 1909, received more than $700. 6. I. S. Thompson, attorney for said Wylie, receiver, and for said W. C. Stone, after having notice of said order and injunction, advised Stone to demand and receive said $3,000, and counseled Wylie to pay the same. 7. I. S. Thompson on the 7th day of December, 1908, and after notice and knowledge of said orders, demanded and received $1,000 from said Wylie, as attorney's fee. 8. H. V. Morehouse, attorney for said Wylie, receiver, and for said W. C. Stone, after notice and knowledge of said orders, asked the State court to order the sale of the property of said company, and advised said Court to pay no attention to the action of the Federal court; and 10. In conjunction with said Thompson, demanded and received from said Wylie as receiver, said $1,000 as attorney's fee.

The said I. S. Thompson, H. V. Morehouse and C. E. Wylie, in their several affidavits, disclaim all willful or contemptuous disobedience, but admit disbursements and receipts of money in the amounts above set out. They aver that the sums paid to Stone were for the rental of the building in which the business was conducted, the occupancy of which was then reasonably worth $500 per month; that the owner, W. C. Stone, was demanding payment of the rent, or that the receiver move out; and threatened suit to enforce collection of rent and treble damages, as provided by the laws of the State of Nevada, if

his demands were not complied with. Inasmuch as the property was then in custody of the State court, and in the belief that the Federal court had no authority to adjust the rents, and that it was wise to do so, the attorneys, I. S. Thompson and H. V. Morehouse, advised, and the receiver Wylie paid, the rent, $3,000, to Stone. Testifying in the State court February 9th, 1909, Wylie said the rental on the 6th day of August, 1908, was $500 per month; that Stone notified him on the 14th day of September, 1908, that the rent would be advanced to $1,500 per month, and on January 8th, 1909, Stone notified him to vacate the premises; that there [78] was an order "telling me (the receiver) to pay the rent as it accrued, all back rents, and all rent due and payable now," but no special order. At that time no allowance had been made to him in any form. Between August 7th, 1908, and January 27th, 1909, his receipts were $26,445.32; his disbursements were $24,964.05. Of the latter amount $11,062.09 was for "merchandise purchased to carry on the business." There was also an order "to carry on the business in its regular channels." Mr. Wylie further testified that when the injunction and restraining order of the Federal court were served, the stores were closed, and have so remained.

The alleged rents paid to Stone during the receivership, as shown by the journal in evidence, were as follows:

Sept.	1.	Aug. 6 to Sept. 30......	$ 894.52
Oct.	7.	Store Rent Acct.......	500.00
Nov.	6.	Nov. Rent on Acct......	500.00

Dec. 7. Store Rent a/c Dec. Rent 1500.00
Jan. 19. Rent on a/c 500.00

Both Thompson and Morehouse testified that they believed it to be for the best interests of the estate to pay these sums, and that the same were authorized by law, and by order of the Court appointing said receiver. The order referred to, omitting the recitals, reads as follows:

"Now, by authority of an act of the Legislature of the State of Nevada, entitled 'An Act providing a general corporation law,' approved March 16th, 1908, it is ordered that the said corporation be and is, so far as these proceedings are concerned, hereby dissolved; and that C. E. Wylie be appointed a receiver in the above-entitled proceedings, with full power to take charge of the assets, control and business of the Exploration Mercantile Company (a corporation), transacting business at Goldfield, in the County of Esmeralda, State of Nevada, and to immediately list and report to the Court all the assets of said corporation, and its entire liabilities, and to do any and all things as ordered and directed by this Court, and that he execute a bond for the faithful performance of his duties as such receiver, in the sum of $50,000.00; that upon the approval and filing of such bond in the sum aforesaid, and taking the oath of office, as required by law, the aforesaid C. E. Wylie be, and he is hereby appointed receiver of the corporation defendant, to wit, the Exploration Mercantile Company, with full power to take charge of the business of said corporation and con-

duct the same and institute any and all suits for the collection of the assets of said company."

There is little or no dispute as to the facts in this case. The order and injunction have been disobeyed. It is claimed they were issued without authority, because, 1. The State court had perfect and complete jurisdiction, and through its receiver was in possession of the property of the corporation when the restraining order and injunction were issued; 2. By section 720 of the Revised Statutes of the United States, the Federal court [79] is prohibited from issuing injunctions to stay proceedings in the State court, "except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." 3. The proceeding in the State court was not an insolvent suit, nor a claim provable in bankruptcy; 4. If it were a provable claim, no proper steps were taken, and no bond was given, as required by section 69 of the bankruptcy act; 5. An injunction can issue only in a pending case. The respondents, H. V. Morehouse, I. S. Thompson, C. E. Wylie, Frank G. Hobbs and W. C. Stone, were not parties to that case. No one but the corporation was sued in the State court. 6. This Court had no jurisdiction over the receiver, the assets in his hands, or the rents and attorneys' fees.

The further reply is that respondents acted in good faith; that the restraining order was not continued in force after hearing of the rule to show cause, and respondent's appearance on that occasion dissolved the injunction, unless it was continued by further order.

The fact that an injunction has been erroneously or irregularly issued is no excuse for its violation. If the Court has the power to issue the injunction, an erroneous or improvident exercise of that power results, not in a void, but in a voidable injunction, which must be obeyed, until revoked or set aside.

High on Inj., sec. 1416; 7 Am. & Eng. Ency. L. 438; In re Eaton, 51 Fed. 804.

On the other hand, if an injunction is absolutely void, as where the Court is without jurisdiction to grant it, a violation thereof is not contempt. At the hearing of the rule, September 18th, 1908, it was shown by the record then before this Court, that the Exploration Mercantile Company is a Nevada corporation, having at least three directors and three stockholders. The only parties to the suit in the State court were W. C. Stone, president of the corporation, and the corporation itself. The suit was brought under section 94 of the corporation law of Nevada, which provides for the dissolution of the corporation, and the appointment of a receiver to wind up its affairs, on application of the holders of one-tenth of its capital stock. The section of the Nevada corporation law referred to [80] reads as follows:

"Sec. 94. Whenever a corporation has in ten successive years failed to pay dividends amounting in all to five per cent of its entire outstanding capital, or has wilfully violated its charter, or its trustees or directors have been guilty of fraud or collusion or gross mismanagement in the conduct or control of its affairs, or its assets are in danger

of waste through attachment, litigation, or otherwise, or said corporation has abandoned its business and has not proceeded diligently to wind up its affairs, or to distribute its assets in a reasonable time, or has become insolvent and is not about to resume its business with safety to the public, any holder or holders of one-tenth of the capital stock may apply to the District Court held in the district where the corporation has its principal place of business, for an order dissolving the corporation and appointing a receiver to wind up its affairs, and may by injunction restrain the corporation from exercising any of its powers or doing any business whatsoever, except by and through a receiver appointed by the court. Such court may, if good cause exist therefor, appoint one or more receivers for such purpose, but in all cases directors or trustees who have been guilty of no negligence nor active breach of duty shall have the right to be preferred in making such appointment, and such court may at any time for sufficient cause make a decree dissolving such corporation and terminating its existence."

Subsequent sections provide for notice to creditors, presentation of claims to the receiver within a limited time, barring of claims not so presented, sale of property, payment of the receiver's compensation and expenses, and distribution of the assets. Although the Act does not provide for discharge of the debtor, it is essentially an insolvent act. The dissolution of a corporation and the distribution of its assets, certainly operate as a discharge of its debts.

Exploration Mercantile Co. vs. Pacific Hardware & Steel Co., 177 Fed. 825, 828.

In considering the Nevada statute the Supreme Court in Hettel vs. District Court, 30 Nev. 382, held that an order appointing a receiver and dissolving a corporation, was void, where the Court had not acquired jurisdiction over the corporation, and over the natural persons interested in the subject matter of the orders at the time they were made. In a later case (Golden vs. District Court, 31 Nev. 250), the same court held that in such a proceeding the directors of the corporation are not only proper, but necessary parties, as if not joined the Court is without jurisdiction to dissolve the corporation or appoint a receiver.

In the present case it appears from the records and the certified copies of proceedings in the State court, which were before this court at the time the rule to show cause was heard, that the order dissolving the corporation and appointing a receiver, was void, because all the directors were [81] not joined as parties to that proceeding, and thus no jurisdiction had been obtained "over the natural persons interested in the subject matter of the orders at the time they were made."

It was shown by the petition for adjudication that the company was insolvent; that it had been doing business at a loss, and selling at greatly reduced prices, and that the receiver had been procuring new merchandise.

The petition filed in the State court contained this allegation:

> "Owing to the depressed condition in business, and the inability of said defendant corporation at the present time to collect the amounts owing to it, the said corporation is in danger of its assets being wasted through attachment or litigation, as the aforesaid claims and other claims are due, and the said corporation is liable at any time to be attached and therefore be unable to carry on and continue its business or to be put to very large and useless expense by way of litigation, and the assets of the property be wasted thereby."

The obvious purpose and effect of the proceeding in the State court was to enable the bankrupt corporation to carry on its business, settle with its creditors, and wind up its affairs under the old management, and thus deprive creditors of their right to have the estate administered in a court of bankruptcy by a trustee of their own selection. In other words, it was clearly an attempt to evade the effect and operation of the bankruptcy act.

In re Watts, 190 U. S. 1, 27, a receiver had been appointed for an insolvent corporation by an Indiana State court, on a bill filed for the purpose of dissolving the company and winding up its business. Mr. Justice Fuller said:

> "The operation of the bankruptcy laws of the United States cannot be defeated by an insolvent commercial corporation applying to be wound up under State statutes. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent per-

sons and corporation, is essentially exclusive. The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit, but that rule can have only a qualified application where winding up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent. Still it obtains as a rule of comity."

What were the rights of the parties and the status of the property when the petition in bankruptcy was filed? The order dissolving the corporation and appointing a receiver being void, Mr. Wylie was but a bailee for the Exploration Mercantile Company; his possession was not a case "of adverse possession, or the possession in enforcement of pre-existing liens"; [82] he, Stone, and Hobbs were still officers of the corporation. Mr. Morehouse and Mr. Thompson were their attorneys. Each of these respondents had actual notice on or about September 18th, 1908, and in Mr. Kennedy's affidavit it is clearly shown that Mr. Stone knew the company was insolvent, consequently he, at least, must be charged with actual knowledge that an act of bankruptcy had been committed.

When the Exploration Mercantile Company, being insolvent, applied for a receiver, it committed an act of bankruptcy. A right at once accrued to the petitioning creditors to have the estate administered in a court of bankruptcy by a trustee to be chosen by

the creditors themselves. When the petition was filed, the jurisdiction of this court commenced. The filing of the petition was "a *caveat* to all the world, and, in effect, an attachment and an injunction."

Mueller vs. Nugent, 184 U. S. 1, 14;
Staunton vs. Wooden, 179 Fed. 61, 62;
York Mfg. Co. vs. Cassell, 201 U. S. 344.

Each of the respondents must be charged with whatever notice or warning is conveyed by the filing of an involuntary petition against the corporation. While the language quoted from Meuller vs. Nugent, *supra,* may not fit every case (York Mfg. Co. vs. Cassell, 201 U. S. 344, 353), it certainly cannot be construed to mean that prior to adjudication a bankrupt "may carry on his business, buy and sell, pay debts, and proceed just as though no petition was filed against him." To concede such a proposition is to admit that in many cases it is within the power of a bankrupt, even after petition filed, to defeat the operation of the act. The trustee, when qualified, is vested by operation of law with the title of the bankrupt as of the date when he was adjudged a bankrupt * * * to all * * * (5) property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him." Section 70-a.

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred or its value, from the person to whom it was transferred, unless he was a bona

fide holder for value prior to the date of the adjudication." Section 70–e. [83]

And finally, receiving "any material amount of the property from a bankrupt after the filing of the petition with any intent to defeat the act" is a criminal offense. Sec. 29–b (4).

From these provisions it follows that property owned by the bankrupt at the time the petition is filed, vests in the trustee, when qualified, as of the date of the adjudication. During the interval between the filing of the petition and the appointment and qualification of the trustee, the title remains in the bankrupt, but it is a title which is liable to be divested. If the property of the bankrupt be conveyed by him with intent to hinder, delay or defraud his creditors, or if there be a conveyance which his creditors might have avoided, it is voidable at the instance of the trustee as against any one except a bona fide holder for value prior to adjudication.

The broad language of the act as quoted above seems to justify the idea that he who deals with nonexempt property of a bankrupt after petition filed, especially if he has actual notice of the filing, does so at his peril. There must be no disposition of the property which will hinder, delay or defraud creditors, or defeat the purpose of the act itself. To this extent, at least, the filing of the petition in bankruptcy was, "in effect, an attachment and an injunction" as against each of these respondents.

In order to protect the estate of an alleged bankrupt, pending adjudication, methods are provided in sections 2 (3), 3–e and 69–a of the bankruptcy act,

whereby the property may be taken into custody of the marshal or a receiver. But manifestly this power can be exercised only when property is in possession of the bankrupt himself, or of some one who holds it for him. This is so because an adverse claimant can be deprived of his possession only by plenary suit. Section 720 of the Revised Statutes of the United States permits a Federal court to stay proceedings in a State court in cases "where such injunction may be authorized by any law relating to proceedings in bankruptcy." Section 11–a of the Bankruptcy Act declares that:

> "A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the [84] dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined."

This section is designed principally for the benefit of the bankrupt himself, in order to prevent creditors from harassing him during the pendency of bankruptcy proceedings, and to secure to him the full effect of his discharge by staying proceedings based on claims against him which are dischargeable in bankruptcy, until he can obtain and interpose his discharge as a defense.

It is very doubtful whether section 11 covers every

proceeding in the State court which may interfere with the administration of the Bankruptcy Act. For instance, litigation which involves the distribution and settlement of the entire estate of an insolvent, is not necessarily based on a claim dischargeable in bankruptcy. The Federal bankruptcy act is of little avail if a State court may never be restrained in its efforts to dissolve an insolvent corporation, dispose of its property, and distribute its assets, until an order of adjudication has been entered. If such be the law, it is easy to conceive that while an adjudication is delayed by a long and stubborn contest, the settlement of an insolvent estate in a State court under State insolvency statutes, may progress to a point where nothing remains for the bankruptcy court but the duty of discharging the bankrupt from his obligations.

If Federal courts are powerless to prevent such a division of procedure; if they are unable to preserve the assets of the bankrupt until the question of his bankruptcy is determined, except in cases where receiver or marshal can take actual possession (sections 69–a, 2 (3), or 3–e) or where injunction may issue under section 11–a, a way has been discovered by which persons who find to their advantage to do so, can defeat the Bankruptcy Act in a large class of cases. It is unthinkable that Congress intended one court should deal with the bankrupt and his creditors, and another court administer his estate. I am of the opinion that Congress has made no such blunder.

By section 2 of the Bankruptcy Act this Court is

"invested * * * with such jurisdiction at law and in equity as will enable it to exercise [85] original jurisdiction in bankruptcy proceedings to * * * (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act."

And by subdivisions (4), (13) and (16) of the same section, it is clothed with ample power to punish violations of the Act, enforce obedience to all lawful orders, and punish persons for contempts committed in bankruptcy proceedings. It is difficult to imagine how more complete authority to preserve the assets of the bankrupt until the question of his bankruptcy is determined, could have been granted.

In re Swofford Bros. Dry Goods Co., 25 Bankr. Repts., 282, 286, it is said that subdivision (15) of section 2 of the Bankruptcy Act "may be availed of to compel anything which ought to be done for, or to prevent anything which ought not to be done against the enforcement of the law; provided the court of bankruptcy otherwise has jurisdiction of the person or the subject matter. * * * A proceeding in bankruptcy is a proceeding in equity, and for the purpose of enforcing and protecting its jurisdiction a court of bankruptcy has all the inherent powers of a court of equity."

In re Hornstein, 122 Fed. 266, Judge Ray says: "It is plain that the Judge of a court of bank-

ruptcy may lawfully grant such restraining order, operative on and binding litigants in the state court, although strangers to the bankruptcy proceedings, as may be necessary for the enforcement of the provisions of the bankrupt act. This court has no hesitation in holding that express power is given by the act of Congress to courts of bankruptcy to enjoin all persons within its jurisdiction, whether litigants in a State court or elsewhere, from doing any act that will interfere with or prevent the due administration of the bankruptcy act. If this is not true, how frail and worthless is the law."

In Blake, Moffitt & Towne vs. Francis-Valentine Co., 89 Fed. 691, an injunction issued out of the District Court of the Northern District of California, to preserve property of a bankrupt estate, and to restrain the sale of property under process from a State court until a petition in bankruptcy could be filed. The injunction was issued before the bankruptcy proceedings were commenced, and the process was the result of an act of bankruptcy committed by the bankrupt in permitting one creditor to obtain a preference [85½] through legal proceedings in the State court. Judge Hawley refused to dissolve this injunction on the ground that authority is given to courts of bankruptcy to take such steps and exercise such powers as may be necessary to protect the rights of all creditors.

In re Hicks, 133 Fed. 739, it was held that a bankruptcy court had jurisdiction under section 2 (15) to enjoin proceedings against a bankrupt fireman looking to his discharge from a municipal fire depart-

ment, because of his failure to pay his debts.

In re Jersey Island Packing Co., 138 Fed. 625, immediately after an involuntary petition had been filed against an insolvent corporation, the District Court of the Northern District of California issued an injunction restraining one of the officers of the corporation from disposing of its assets under a trust deed. Judge Gilbert, speaking for the Circuit Court of Appeals, said that the filing of the petition was, in substance and effect, an attachment and an injunction, and placed the property of the bankrupt constructively in custody of the court of bankruptcy, and that under subsection 15 of section 2 of the Bankruptcy Act,

> "the Court may, upon proper application and cause shown, restrain not only the debtor, but any other party, from making any transfer or disposition of any part of the debtor's property, or from any interference therewith. Beach vs. Macon Grocery Co., 116 Fed. 143; 53 C. C. A. 463. In that case creditors who had filed an involuntary petition in bankruptcy against their debtor filed therewith an ancillary bill in equity alleging that a third person claimed possession and ownership of property which was in fact a part of the bankrupt's estate. The Circuit Court of Appeals for the Fifth Circuit held that the Court had the power to issue an injunction restraining such person from selling or incumbering the property pending the hearing on the petition, and, in case an adjudication of bankruptcy were made, until the trustee could proceed adversely against the claimant to determine the title to the property."

In New River Coal Land Co. vs. Ruffner Bros., 165 Fed. 881, 886, the Circuit Court of Appeals for the Ninth Circuit appears to be of the opinion that the authority of a court of bankruptcy to enjoin proceedings in a State court in order to administer the estate of a bankrupt through the instrumentality of the general bankruptcy law, is not founded on the fact that the basis of the suit in the State court is a claim dischargeable in bankruptcy, but rather on the fact that jurisdiction of the Federal court to administer on the affairs of insolvent corporations and persons is essentially exclusive. [86]

In re Standard Cordage Company, 184 Fed. 156, a corporation had applied to a New York State court to be dissolved. Subsequently bankruptcy proceedings were initiated, and a receiver appointed in the Federal court. On motion, Judge Hazel vacated the order of appointment, but refused to dismiss the bankruptcy proceedings, and "enjoined the payment of principal or interest on mortgage bonds of the insolvent pending the adjudication, and also the distribution to creditors or bondholders of the assets of the corporation, or any fund realized out of the sale of his real or personal property by order of the State court in the dissolution proceedings, to the end that if an adjudication in bankruptcy is had, such fund, assets, and the property may be distributed under the provisions of the Bankruptcy Act."

In re Hathorn, Fed. Cas. 6,214, on petition of one of three partners, a State court decided that the firm was insolvent, and decreed the appointment of a receiver. Eight days later the petitioning partner was

himself appointed such receiver. One day before this appointment, the other members of the firm filed a petition in the United States District Court, praying that the partnership be adjudged a bankrupt. More than two months later, pending trial of the issue as to whether the firm was bankrupt or not, the partner who was receiver in the State court, was enjoined by the bankruptcy court from making any disposition of partnership property, or from any interference therewith, until the issue of bankruptcy could be tried. It was objected there, as here, that the Court had no jurisdiction to make such an order because all the assets of the firm were in the hands of the State court. Judge Wood declared that the design and purpose of the Bankruptcy Act was to secure the assets of insolvents to their creditors in the very mode pointed out therein, with all due safeguards, protection and summary procedure; and that proceedings such as those in the State court, though not based on a claim against the property of a debtor, could not be permitted to bar the action of a court of bankruptcy or protect the assets of the firm from administration in the bankruptcy court.

In re Electric Supply Company, 175 Fed. 612, 23 Am. Bankr. Rept. 647, it appeared that a receiver had been appointed by a Georgia State court for an insolvent corporation. Within four months thereafter creditors of the [87] corporation filed a petition, praying that it be adjudged a bankrupt, because, being insolvent, it had applied to said State court for a receiver for its property.

The case is singularly like the one at bar, particu-

larly in the bankrupt's statement of the conditions which led to the application for a receivership in the State court. The assets of the corporation exceeded its liabilities. It was impossible to raise necessary capital to meet its obligations; its promissory notes and accounts were overdue, and it was threatened with litigation. The petition in the State court was sworn to by the president of the company; he was then appointed receiver. It was insisted that the receiver's management was prudent, economical and profitable; that creditors holding more than two-thirds of the company's indebtedness were content with the receivership, and that the injunction issued by the Federal court against the receiver was operating to the disadvantage of creditors.

On the hearing of the rule to show cause, after discussing the bill in the State court, Judge Speer said:

> "It is true that the alleged bankrupt, with some astucity, is careful to say that it is not insolvent. * * * But the denial is unimportant in view of the recitals showing its utter incapacity to pay its debts. Indeed, the scheme of the bill, if effective, would create a special bankruptcy proceeding for the Electric Supply Company, not only lacking in that uniformity of operation required by the national law, but as restrictive in territory as it is peculiar and unique in other respects. It is equally clear that the proceeding filed by the Electric Supply Company in the State court was an act of bankruptcy. * * * Since the petition was filed within four months antecedent to the bankruptcy, and it discloses the complete insolvency of

the corporation itself, the provisions of the bankruptcy law would become operative, and the court of another jurisdiction would have no right to sequester the property and restrain creditors otherwise entitled to proceed in the bankruptcy court."

Pending adjudication, Judge Speer, on *ex parte* application refused to appoint a receiver, but granted a temporary injunction, restraining the receiver of the State court from disposing of the property of the corporation. On the hearing of the rule to show cause the injunction was continued, and a receiver was appointed and directed to apply in terms of suitable respect to the State court for the property.

I am therefore constrained to find, under the foregoing authorities, that this Court had the power to make the order and injunction in question, and that their issuance is amply justified in the proof offered at the [88] hearing of the rule to show cause.

The fact that Wylie and Stone, and probably Hobbs, acted under advice of counsel, under the circumstances carries but little weight. It is not shown that there was a full disclosure to counsel, or, indeed, that any disclosure was made on which the alleged advice was given. Without such a showing, the advice given neither justifies nor mitigates the wrong committed in pursuance of such advice; it rather suggests that a full statement might be disadvantageous to client or counsel, or perhaps to both.

"No one has a right," says Judge Jackson in Ulman vs. Ritter, 72 Fed. 1000, 1003, "to determine for himself whether he will respect or disregard an order of court, and if he does so of his own volition,

or in pursuance of legal advice, he merely takes the law into his own hands, and must answer for his conduct, whether the order of the court was right or wrong."

9 Cyc. 25; Royal Trust Co. vs. Washburn, etc. Ry. Co., 113 Fed. 531; Queen & Co. vs. Green, 170 Fed. 611; Leber vs. United States, 170 Fed. 881; Cary Mfg. Co. vs. Acme Co., 108 Fed. 874; In re Wilk, 155 Fed. 943.

The fact that the $1,000 received by Mr. Thompson and Mr. Morehouse from Mr. Wylie was paid ostensibly as attorneys' fees does not, in my opinion, excuse them. Their appropriation of the money was in defiance of the order of this Court. Their services were performed in an unsuccessful attempt to enable an insolvent corporation, guilty of an act of bankruptcy, by the very act of bankruptcy to defeat the jurisdiction of this Court. Their efforts resulted in litigation, obstructing the bankruptcy proceedings, and causing delay and great expense, with no benefit whatever to the estate. Even though they believed they were within their legal rights, and that the State court had priority of jurisdiction, that fact affords no reason why the estate should pay them for making such an error, or for performing services which were of no benefit.

In re Zier & Co., 142 Fed. 102.

The same observations may be applied to C. E. Wylie and his claim that the $1,000 received by him was in payment for his services as receiver. His services were detrimental to the estate, and more than unprofitable to the creditors. Furthermore, the order

appointing him was void.

In re Rogers and Stefani, 156 Fed. 267.

The corporation was hopelessly insolvent when the petition was filed in the State court. Mr. Kennedy's affidavit shows this fact was known to [89] W. C. Stone at the time. Indeed, it is difficult to imagine any practicable method by which Mr. Stone, the president, or Mr. Wylie, the vice-president and manager of the corporation, or Mr. Hobbs, its bookkeeper, could have avoided full and definite knowledge of the fact that the company was insolvent. Had the Exploration Mercantile Company been solvent at that time, or had Stone and Wylie with some show of reason actually believed it to be so, we should have a different situation. The State court unquestionably had exclusive jurisdiction, after proper procedure taken, to wind up the affairs of the corporation, if solvent, but it was not solvent. This fact being known to Stone, and probably to Wylie and Hobbs also, admits no other inference than that Wylie and Stone deliberately concealed this controlling fact from the State court, and sought its assistance to deprive creditors of their undoubted right to have the estate administered and distributed in a bankruptcy court. If the financial condition of the corporation had been disclosed in the State court as it was in the Federal court, there would have been no conflict of jurisdiction.

The fact that W. C. Stone threatened suit for rent and treble damages, and demanded that the premises be vacated, is no defense to Wylie, Thompson or Morehouse for their conduct in permitting Stone to

appropriate the $3,000. The Court had ample power to enjoin Mr. Stone from any such interference with the administration of the estate. This follows from the conclusions arrived at earlier in this opinion, and is supported in In re Chambers Calder & Co., 98 Fed. 865; In re Schwartzman, 167 Fed. 399.

In reply to the argument that respondents had no thought of treating this Court with disrespect, it is sufficient to say they still retain the moneys taken by them from the bankrupt estate.

The fact that Stone on the very day he was served with the restraining order and injunction, gave notice that he would raise the rent from $500 to $1500 per month, and the actual collection and payment of $1500 for the month of December, is expressive of defiance rather than respect for the orders of this court. This observation applies with no less force to counsel who advised the payment and to the receiver who made it, than to the president of the company who actually received it. If it were proper **[90]** for Stone to demand and receive $1,500 per month, he might with equal propriety have demanded and received $5,000. The stores were closed in obedience to the order of this Court, but the respondents were in no wise deterred by the same order from demanding and receiving for themselves the moneys of the bankrupt corporation. Self-interest appears to have been something of a factor in determining the amount and character of respect due this Court.

It is objected that respondents were not, and could not have been, made parties to the original bankruptcy proceedings; therefore the Court had no juris-

diction over them, and they could not be enjoined at all. It is sufficient to say that under section 2 (15) quoted above, the bankruptcy court has power between the filing of the petition and adjudication, as well as afterwards, to enjoin persons within its jurisdiction, whether parties to the bankruptcy proceeding or not, from making any transfer or disposition of any part of the debtor's property, or from doing any other thing which will interfere with the administration of the Bankruptcy Act. The petition for such an injunction should be filed and the injunction issued in the bankruptcy proceeding itself. I Remington on Bankruptcy, secs. 359, 361; In re Jersey Island Packing Co., 138 Fed. 265; In re Globe Cycle Works, 2 Am. Bankr. Rep. 447.

Section 2 (13) of the Bankruptcy Act supplies the Court with authority to enforce obedience to its lawful orders, not only from bankrupts, but also from other persons.

In Boyd vs. Glucklich, 116 Fed. 135, the Court declares that "Any act, matter, or thing which any United States court may punish as a contempt may be punished as such by a court of bankruptcy."

Section 725, Rev. Stats. U. S. vests the federal courts with power "to punish by fine or imprisonment, at the discretion of the Court, contempts of their authority; * * * and a disobedience or resistance * * * by any party, juror, witness *or other person* to any lawful writ, process, order, rule, decree or command of the said courts."

"To render a person amenable to any injunction, it is neither necessary that he should have been a

party to the suit in which the injunction was issued, nor have been actually served with a copy of it, so long as he appears to have had actual notice." [91]

In re Lennon, 166 U. S. 548; American Steel etc. Co. vs. Wire Drawers' Union, 90 Fed. 598, 604; Phillips vs. Detroit, 19 Fed. Cas. No. 11,101.

None of the respondents were formal parties to the bankruptcy proceeding. The order which restrained Mr. Wylie and the Exploration Mercantile Company from selling or otherwise disposing of its property, does not include or restrain Mr. Stone, Mr. Morehouse, Mr. Thompson, or Mr. Hobbs by name, or by any general description. The injunction prohibiting further prosecution of the suit in the State court, and all further steps and proceedings therein, runs against the Exploration Mercantile Company, Mr. Stone, Mr. Wylie, and the agents, servants, attorneys and counselors of each of them. Mr. Hobbs, Mr. Thompson and Mr. Morehouse are not expressly named therein. The omission of the name of Mr. Stone, or the name of any other respondent, however, did not give any authority or permission to advise, persuade, or compel Mr. Wylie to disobey or ignore the orders of this Court. Orders and injunctions are among the instruments with which courts accomplish their ends, and perform their duties. Any person, be he party or not, who knowingly thwarts the purpose of the Court, either by resisting its commands, or wilfully counseling, aiding, abetting, inducing or compelling the party who is enjoined, to resistance or

disobedience, acts at his peril. While such conduct, under some authorities, may not constitute a technical breach of the injunction, it is, nevertheless, disrespectful to the Court, and may be treated and punished as contempt, under section 725 *supra.*

It is said In re Reese, 107 Fed. 942, 945, that "The power to punish for contempt is not limited to cases of disobedience by parties to the suit, of some express command or rule against them, but, subject to the limitations imposed by section 725, *supra,* is coextensive with the necessity of maintaining the authority and dignity of the court."

It is the usual practice in granting an injunction against a corporation to extend the injunction to officers, attorneys, agents and employees of the company. And this is just as effectual against such servants, officers, employees and attorneys as though they were parties defendant to the original bill.

Sidway vs. Missouri Land & Live Stock Co., 116 Fed. 381, 390; Toledo etc. Ry. Co. vs. Pennsylvania Co., 54 Fed. 746; Hedges vs. Court, 7 Pac. 767; [92]

Such an injunction is binding, not only on the corporation, but on each individual who acts for the corporation in the transaction of its business, provided he has knowledge of the writ and its contents.

Ex parte Lennon, 64 Fed. 320; People vs. Sturtevant, 59 Am. Dec. 536, 546; Morton vs. Superior Court, 4 Pac. 489; 2 High on Inj., sec. 1443.

The rule that a stranger to the suit can be punished for contempt rests not only on the clear language of

the statute itself, but on the broad doctrine that the power to make an order carries with it an equal power to enforce the order by punishing those who disobey or resist it. Otherwise the lawful commands and purposes of the Court might be thwarted, and brought to naught by the resistance of strangers. In Seaward vs. Paterson, 1 Ch. 545, 76 L. T., N. S., 215.

"An injunction was issued against Paterson to restrain him from holding glove-fights or boxing contests on certain premises. One Murray, who had later acquired possession of the premises and conducted boxing contests thereon, was cited for contempt. It was insisted in his behalf that he was neither a party to the action nor an agent or servant of such party, and that consequently he could not be held. He was adjudged guilty of contempt, however, on the ground of knowingly aiding and assisting in doing that which the Court had prohibited. In approving of this action on the part of the trial court, the court of appeals drew a distinction between the kind of contempt here complained of and that which consists in a disobedience to an order by a party to the suit. Among other things, Lindley, L. J., after observing that Murray was not a party to the action, either first or last, but that he knew all about the order and was responsible for the violation of it, said: 'Now, let us consider what jurisdiction the court has to make an order against Murray. There is no injunction against him. He is no more bound by the injunction granted against Paterson than any other member of the public. He is bound, like other members of the

public, not to interfere with, and not to obstruct, the course of justice; and the case, if any, made against him must be this—not that he has technically infringed the injunction which was not granted against him in any sense of the word, but that he has been aiding and abetting others in setting the court at defiance, and deliberately treating the order of the court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is no jurisidiction to attach him for contempt as distinguished from a breach of the injunction. * * * I confess that it startled me, as an old equity practitioner, to hear the jurisdiction contested upon the facts in this case. It has always been a familiar doctrine to my brother Rigby and myself that the orders of the Court ought to be obeyed, and could not be set at naught and violated by any member of the public, either by interfering with the officers of the court, or by assisting those who are bound by its orders.' " To the same effect see:

Bessette vs. W. B. Conkey Co., 194 U. S. 324;
Wellesley vs. Earl of Mornington, 11 Beav. 181.

In re Reese, *supra,* is much relied on by respondents. That case arose out of labor difficulties in Kansas. An injunction had been issued [93] out of the Federal court against some 46 named persons, and other citizens of Kansas, "who have or may combine or confederate with them, restraining interference with complainant and its employees." Reese came with three hundred men from Iowa. It is charged that he interfered with complainant's miners, but not

that he aided or abetted defendants, or confederated with them, or that he was an agent, servant, or employee. He was not a citizen or resident of Kansas. He seems to have acted independently of the defendants. The Court held that he could not be punished for violating the injunction, because he was neither a party to the case itself, nor agent, servant, employee or attorney of any part or parties thereto, and inasmuch as he had not been charged with aiding, abetting or confederating with them, he was discharged.

In the present case all the evidence tends to show that Wylie, Stone, Morehouse and Thompson were acting together as allies and confederates; that Mr. Stone was their leader. The charge is that Stone willfully and contemptuously demanded and received from said C. E. Wylie certain sums of money. Thompson and Morehouse are charged with actively counseling and advising Wylie to disobey the orders of this court, and to pay the money demanded by Stone.

This distinction is a very important one, and it brings the conduct of the respondents just named clearly within the following rule stated by Judge Adams in the Reese case:

"It is entirely consonant with reason, and necessary to maintain the dignity, usefulness, and respect of a court, that any person, whether a party to a suit or not, having knowledge that a court of competent jurisdiction has ordered certain persons to do or abstain from doing certain acts, cannot intentionally interfere to thwart the purposes of the court in making such order. Such an act, inde-

pendent of its effect upon the rights of the suitors in the case, is a flagrant disrespect to the Court which issues it, and an unwarrantable interference with, and obstruction to, the orderly and effective administration of justice, and as such, is and ought to be treated as contempt of the court which issued the order."

In Huttig Sash & Door Co. vs. Fuelle, 143 Fed. 363, there was a temporary order enjoining defendants from boycotting complainant in person or through the agency of others. Several of the defendants were cited to show cause why they should not be punished for contempt. With them were joined three persons, Bohnem, Crowe and Mellville, who were not defendants in the original suit, and were not named in the restraining order. They were charged, [94] however, with aiding, abetting and assisting others in violating the restraining order. All were found guilty of contempt, including the three parties last named.

The case at bar is like the one just cited. Stone, Morehouse and Thompson are not named as defendants. The restraining order does not run in terms against agents, employees, or attorneys, but it is charged that Stone willfully and contemptuously demanded and received from C. E. Wylie certain sums of money; that Thompson and Morehouse willfully and contemptuously demanded and received the sum of $1,000; and that Thompson advised and counseled Wylie to pay Stone's demand. The evidence shows that Stone on the very day he was served with the restraining order gave notice that the rent of the

building owned by him and occupied by the company would be raised from $500 to $1,500 per month; and later he actually collected $1,500 rental for the month of December. He also threatened to bring suit for rent and treble damages, and notified Wylie to vacate. Morehouse and Thompson advised the payment of the money to Stone. The conduct charged and proven certainly is that of counseling, aiding and abetting Wylie in his violation of the restraining order.

In Sloan vs. The People, 115 Ill. App. 84, 89, it was held that under charge of violating an injunctional order a respondent may be convicted of aiding and abetting others in such violation as the former charge includes the latter.

The charge against Hobbs is that he knowingly violated the order by receiving $700. This he did receive with full knowledge of the injunction, and this is all which is proven against him.

The evidence clearly shows that the injunction against taking any further steps in the suit in the State court was violated by Wylie, Thompson and Morehouse, and that each had a part in applying to the State court for an order to sell property. Each is guilty of contempt in that matter, and the fine for that offense is fixed for each at $1.00.

I find that Mr. Wylie is guilty of contempt in that he violated the order restraining him from disposing of the property of the Exploration Mercantile Company, by paying $3,000 to Mr. Stone, $1,000 to Mr. Thompson [95] and Mr. Morehouse, $700 to Mr. Hobbs and $1,000 to himself. For this he will be fined in the sum of $1,000.

Mr. Stone, Mr. Thompson and Mr. Morehouse are found guilty of contempt in that each of them knowingly, willfully and contemptuously counseled, advised and induced Mr. Wylie to violate said restraining order, and each aided him by appropriating to his own use money belonging to the company. The fines are fixed as follows: Mr. Stone $3,000; Mr. Morehouse, $500; Mr. Thompson, $500; Mr. Hobbs, $200.

Counsel will prepare orders appropriate to the foregoing findings, and add thereto the provision that each respondent herein found guilty of contempt pay his fine within ten days after service on him of a certified copy of said order, otherwise he will be committed to the County Jail of Ormsby County, Nevada, until payment of his fine, or until further order of this Court.

The fines of Mr. Wylie and Mr. Stone, $1,000 and $3,000, will be paid to the Clerk of this court for the benefit of the bankrupt estate. The fines of Mr. Thompson and Mr. Morehouse will be paid to the Clerk of this court, and by him paid to the creditors prosecuting these contempt proceedings, as partial compensation for their expenses, costs and attorneys' fees herein. The remaining fines will go to the Government.

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of the Exploration Mercantile Co. (a Corporation), Bankrupt. And the Application of P. F. Carney in Said Proceeding by Affidavit, and the Order of Hon. E. S. Farrington, Judge of Said Court, of Date July 9th, 1909, Issued to W. C. Stone, C. E.

Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Opinion. Filed January 29th, 1912, at 10 o'clock A. M. T. J. Edwards, Clerk. [96]

[Petition for Writ of Error.]

In the District Court of the United States in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, a Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson, and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

The above-named defendants, H. V. Morehouse and I. S. Thompson, feeling *themselves by* the orders and Judgments entered on the 12th day of April, 1912, in the above-entitled proceeding, come now in proper persons, as attorneys for themselves, and petition said Court for an order allowing them, said defendants, to prosecute a Writ of Error to the Hon. The United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States, in that behalf made and provided, and also that an order be made fixing the amount of security which the defendants shall give and furnish upon

said Writ of Error, and that upon giving such security, all further proceedings be stayed and suspended until the determination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioners will ever pray.

H. V. MOREHOUSE and
I. S. THOMPSON,
In Proper Persons,
Attorneys for Petitioners.

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, Bankrupt. And the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Petition for Writ of Error. Filed April 22, 1912, at 5 o'clock and 30 Minutes P. M. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [97]

[Assignment of Errors.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, a Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court,

of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

Come now the defendants, H. V. Morehouse and I. S. Thompson, and file the following assignment of errors, upon which they will rely upon their prosecution upon the Writ of Error, in the above-entitled cause, from the orders and judgments made and entered on the 12th day of April, 1912, in said cause or proceeding, above entitled.

I. That the present District Court of the United States, in and for the District of Nevada, had no power, authority or jurisdiction, to make the finding of facts or give, grant, or enter judgment in the above-entitled proceeding, upon a cause or complaint or affidavit or proceeding, charging a contempt of an order, or injunction, or rule of the District Court of the United States, in and for the District of Nevada, which said last mentioned District Court in and for the District of Nevada, ceased to exist, on the first day of January, 1912, under and by virtue of An Act of the Congress of the United States, entitled "An Act to Codify, Revise, and Amend the laws relating to the judiciary," approved March 3d, 1911, in this, to wit, that the old United States District Court for the State of Nevada was abolished and forever ceased to exist on the 1st day of January, 1912, and that in the acts charged against these defendants were charged to have been done and performed before the 9th day of July, 1909, and therefore if any contempt was com-

mitted, such contempt was against the old District Court of the United States, and could only be punished by that court, and none other, and the present District Court of the United States, has no [98] jurisdiction in the premises, and the orders and judgments herein are void.

II. That the proceedings herein are for a criminal contempt, and so much of the judgments and decrees herein, as fines these defendants each in the sum of $500.00 as remedial compensation, for expenses, costs and attorneys' fees for the prosecution of these defendants, or the petitioning creditors of affiants in these proceedings, is beyond the power and jurisdiction of this court, and further, that in the affidavit of P. F. Carney, no prayer of any kind or relief of any kind is demanded or requested in behalf of the affiants or petitioners, and the Court could not have the power to grant civil relief where none is asked or demanded.

III. That the Court had no power or authority to issue the injunction herein, and the same was and is void for the reason that before the bankruptcy proceeding herein, the property of the bankrupt corporation had passed into the possession of the State Court, and was not in the possession of the bankrupt defendant, and that no jurisdiction of property could vest in the United States District Court, as a court of bankruptcy, until after the defendant corporation had been adjudicated a bankrupt; and that neither of these defendants were ever made parties to the bankrupt proceeding.

IV. That C. E. Wylie was at all the times men-

tioned in these proceedings, the duly qualified receiver of the State Court, and as such receiver could not be enjoined by the District Court of the United States, and his possession and control of the property of the corporation bankrupt, was absolute, and under the control and orders of the State Court until the corporation had been adjudicated bankrupt; and his duties as such receiver was beyond the injunctive process of the bankrupt Court, until by adjudication in bankruptcy, the title and possession of the bankrupt's property had been divested from the State Court and vested in the bankrupt court, and all the acts of these defendants as attorneys for said receiver could not be in violation of the injunction of the court of bankruptcy, because that injunction was void and of no effect, as against said Wylie, and these defendants.

V. That the injunction was beyond the power and jurisdiction of said bankrupt court, because under and by sec. 720, Rev. St. of the United States, the court had no power to issue an injunction to stay the proceedings in [99] the State court, sitting as a court of Equity or while exercising equity powers. Its only authority was that authorized by the bankrupt law, and that law, only authorized a stay order against "A suit founded upon a claim from which a discharge in bankruptcy would be a release." And the suit in the State court was upon no such claim; therefore the injunction was beyond the jurisdiction of the court to issue.

VI. The injunction was not effective against Wylie, as receiver, or Thompson, or Morehouse, be-

cause they were not parties to the bankrupt proceedings, and all their acts were as officers of the State court, in the proceedings in that court, and of which that court only had jurisdiction, until an adjudication in bankruptcy, and they are not charged with anything done or said after adjudication.

VII. The possession of the property being in the lawful possession of the receiver of the State court, the bankrupt court could not make any order or injunction restraining or preventing him, from doing his duty as the arm of the State court, and his possession being adverse to the bankrupt and the petitioning creditors, and he not being the agent or employee of the bankrupt, he could not be proceeded against by any summary process of the United States Court, and his lawful possession of property interfered with, without violating sec. 1 of art. XIV of the Constitution of the United States, because he would be entitled to the "due process of law," in that he should be made a party to the bankrupt proceeding, due service of process, the right to appear and defend, and the right of trial by jury and the stay of proceedings against him, or an injunction against him, was a contempt of the State court, and a process he *dared* not obey, and these defendants were only acting as attorneys for the receiver, and are nowhere charged as acting otherwise, in violation of the injunction.

VIII. The injunction and stay order were only preliminary and not perpetual, and therefore on the 9th day of July, 1909, when the adjudication in bankruptcy took place, the stay order and injunction not having been continued in force by any order of the

court, they ceased to be of any effect, and these proceedings being after that time, the jurisdiction of the court in that behalf ended.

IX. The answers of these defendants being under oath, and the truth [100] thereof, not being denied, is a complete defense, and the court had no power to render judgment against them.

X. The proceedings in this case being criminal, and so held as the law of this case in Morehouse et al. vs. Pacific Hardware & Steel Co. et al., 177 Fed. Rep. 337, the defendants cannot be held guilty, except beyond a reasonable doubt, and therefore the judgment of the Court cannot be upheld, because it fully appears by the records herein, that these defendants were acting under an honest belief, that their acts were lawful.

XI. The Receiver and these defendants could not be held legally for contempt, because all the things of which they are charged are and were acts done under the authority of said State court, and that all advice and receipt of moneys were through, by and under the authority of said State court, and these defendants could not do anything relating to the property or moneys in the hands of said receiver except by the authority of said State court, and therefore it was not in their power to obey the order of said U. S. Court, as it was their duty to obey the said State court, until an adjudication was had in said bankrupt court.

XII. These defendants were not in contempt by the acceptance of the sum of $1,000.00 as part payment of their services, from said receiver, as ordered by said State court, for the reason that even though

the filing of a petition in involuntary bankruptcy had been *ipso facto* the destruction of jurisdiction in the State court, and put the duty of that court to give the possession of the estate in the hands of its receiver over to the bankrupt court, it yet had the duty to settle its accounts with its receiver, and allow him his counsel fees and other expenses before transferring the assets, and this payment of one thousand dollars it passed upon and allowed, as just and proper, and its jurisdiction as State court in that behalf, superseded all proceedings in the bankrupt court.

XIII. Further, it appears by the affidavit of P. F. Carney, upon which these proceedings are based, that Giant Powder Company, Consolidated, Pacific Hardware and Steel Company, and J. A. Folger and Company, were the persons or corporations upon whose petition or affidavit made by one J. L. Kennedy, the stay order and injunction were issued herein, and yet we find by the affidavit or answer of defendant I. S. Thompson, herein, that on the [101] 18th day of March, 1909, these same persons or corporations recognize and invoke the jurisdiction of the said State court, upon this very payment of $1,000.00 to these defendants, and by so doing upon their own motion, procure the allowance of the same, as "an extremely reasonable sum," and thereby are estopped from asking or conferring jurisdiction upon the U. S. District Court, to punish these defendants as for a contempt, and the court could not allow them the penalty of $500.00, against each of these defendants, as compensation for their expenses, costs and attorneys' fees, for by their own acts the same was settled,

allowed and satisfied, and the action of said State court was binding upon them, and not thereafter subject to dispute and collateral attack.

XIV. That it appears from the affidavit of I. S. Thompson herein, that a creditor of said corporation, the assets of which were in the possession of said State court, to wit, W. P. Fuller & Co., petitioned said State court long prior to any adjudication in bankruptcy, and obtained the order of said State court, commanding the receiver to file a complete inventory, and that under such proceeding not initiated by these defendants or the said receiver, that an order to show cause why the receiver should not sell the estate, etc., was made by the Court, and that these defendants did not apply nor did the receiver apply for any such order, and therefore these defendants were not in contempt of the order or injunction herein.

XV. It appears upon the face of the petition in bankruptcy, that no prayer for an injunction, or for a stay order was made therein, or that these defendants or said receiver was ever a party or parties to said proceeding; and the affidavit made by J. L. Kennedy gives the court no jurisdiction to issue either a stay order or an injunction, for the reason there is no allegation of insolvency or a want of a plain, speedy or adequate remedy at law, but, on the contrary, it clearly appears that the estate of the then alleged bankrupt was in the hands of a receiver of the State court having jurisdiction, and by all legal proceeding was necessarily under heavy bonds, fully protecting the estate in his hands, and that no injury could result to the petitioners, and the bankrupt law

gave them, then and there, a complete legal remedy by giving bond to the Court, and asking the [102] appointment of a receiver or the U. S. Marshal to take possession of the estate, or had they not so desired to do, upon adjudication in bankruptcy, the appointed trustee had full power under the bankrupt law to sue and recover the full value of the estate by an action at law, so that the affidavit was wholly wanting in merit or facts, to invoke the equitable powers of the Court, and the Court was without jurisdiction to issue the stay order or the injunction.

XVI. It fully appears by the affidavits of these defendants, as to when, how and why they acted, and that they acted in good faith, and that they and each of them are attorneys at law, representing so far as this proceeding is concerned, only the receiver of the State court, and that under In re Watts, 190 U. S. 1, they are not guilty of contempt and cannot be so held, and the rule is, that their answers cannot be traversed.

XVII. That the judgments are wrong and contrary to law, because upon the affidavit of P. F. Carney no relief of any kind is demanded, and as the contempt, if any, was not in the presence or hearing of the Court, and must be founded upon affidavit, the affidavit is wholly insufficient, and does not give any authority to the Court to adjudge defendants guilty, either civilly or criminally.

XIX. Upon these grounds, alleged as error in the action of the Court herein, these defendants pray, that the judgment of the Court be reversed, and that the orders and judgments against them be set aside and such directions be given that full force and efficacy

may inure to these defendants by reason of the defense set up in their answers or affidavits, and that it be held they and each of them are not guilty of a contempt of Court and that the said United States Court be ordered to dismiss these proceedings, set aside and annul its action against these defendants and each of them.

H. V. MOREHOUSE, and
I. S. THOMPSON,
In Proper Person,
Attorneys for Defendants and Plaintiffs in Error.

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, Bankrupt. And the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson, and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Assignment of Errors. Filed April 22, 1912, at 5 o'clock and 30 minutes P. M. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [103]

[Order Allowing Writ of Error.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, a Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

At a stated term, to wit, the February term, A. D. 1912, of the District Court of the United States, for the District of Nevada, held at the courtroom of said court, in the City of Carson, State of Nevada, on the 22 day of April, 1912,—Present: The Hon. E. S. Farrington, District Judge, in the Matter of Exploration Mercantile Company, a Corporation, a Bankrupt, and the Application of P. F. Carney, in said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc., upon Motion of H. V. Morehouse and I. S. Thompson, Attorneys in Proper Person, for Themselves as Defendants, and the Filing of a Petition for Writ of Error and Assignment of Error:

It is ordered that a Writ of Error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals, Ninth Circuit, the judgments and orders heretofore entered herein against said defendants, H. V. Morehouse and I. S. Thompson, and the amount of the bond on said Writ of Error be and is hereby fixed at Fifteen Hundred ($1,500.00) Dollars, for the prosecution of said Writ; said undertaking shall operate as a *supersedeas,* and all proceedings against the said Thompson and Morehouse are hereby stayed until the said Writ shall be heard and determined in said Circuit Court of Appeals.

E. S. FARRINGTON,
District Judge. [104]

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, Bankrupt. And the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson, and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Order Allowing Writ. Filed April 22, 1912, at 5 o'clock and 30 Minutes P. M. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [105]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, a Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

Bond on Writ of Error.

Know All Men by These Presents, that we, H. V. Morehouse and I. S. Thompson, as principals, and T. H. Cline and W. St. Pierre as sureties, are held and firmly bound unto the United States of America and to the Giant Powder Company, Consolidated, a corporation; Pacific Hardware & Steel Company, a corporation; J. A. Folger & Company, a corporation, petitioners herein, in the sum of Fifteen Hundred Dollars ($1500.00), to be paid to the said petitioners, their executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives, executors or administrators firmly by these presents. Sealed with our seals and dated the 13th day of May, 1912.

Whereas, the above-named defendants, H. V.

Morehouse and I. S. Thompson have sued out a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the judgment and orders in the above-entitled cause given, made and entered on the 12th day of April, 1912, by the District Court of the United States in and for the District of Nevada.

Now, therefore, the condition of this obligation is such that if the above-named H. V. Morehouse and I. S. Thompson shall prosecute said writ to effect and answer all costs and damages, if they shall fail to make good their plea, then this obligation shall be void, otherwise it will remain in full force and virtue. **[106]**

H. V. MOREHOUSE. [Seal]
I. S. THOMPSON. [Seal]
T. H. CLINE. [Seal]
W. ST. PIERRE. [Seal]

United States of America,
State of Nevada,
County of Esmeralda,—ss.

T. H. Cline and W. St. Pierre being first duly sworn, each for himself and not one for the other deposes and says: I am the same person whose name is subscribed to the foregoing bond as the surety therein, and I state that I am worth the sum specified as a penalty thereof, over and above all my just debts and liabilities, exclusive of property which is exempt from execution.

T. H. CLINE. [Seal]
W. ST. PIERRE. [Seal]

Subscribed and sworn to before me this 13th day of May, 1912.

[Seal] CHAS. HATTON,

Notary Public in and for the County of Esmeralda, State of Nevada.

My commission expires Oct. 15, 1915.

The foregoing bond is approved as an undertaking to prosecute the writ of error, and also approved as a *supersedeas,* as to said Morehouse and Thompson.

Dated May 16th, 1912.

T. J. EDWARDS,

Clerk U. S. Dist. Court, Dist. Nevada.

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, Bankrupt. And the Application of P. F. Carney in said Proceedings by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Bond on Writ of Error. Filed May 16, 1912. T. J. Edwards, Clerk. [107]

[Writ of Error.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, a Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

The President of the United States, to the Honorable E. S. FARRINGTON, the Judge of the District Court of the United States, for the District of Nevada:

Because in the record and proceedings, as also in the rendition of judgment, which is in the District Court before you, wherein Giant Powder Company, Consolidated, Pacific Hardware and Steel Company, a Corporation, and J. A. Folger and Company, upon affidavit of P. F. Carney, petitioners herein and H. V. Morehouse and I. S. Thompson, defendants and plaintiffs in error, a manifest error has happened to the great damage of the defendants H. V. Morehouse and I. S. Thompson, plaintiffs in error, as by their complaint appears, we being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this

behalf, we command you if judgment be therein given that then under and upon your seal distinctly and openly you send the record and proceeding aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the [108] same at the City of San Francisco, State of California, on the 17th day of May, 1912, in the said Circuit Court of Appeals, to be then and there held that the record and proceedings aforesaid may be inspected; that the said Circuit Court of Appeals may further cause to be done therein to correct that order, that of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 22d day of April, 1912.

Attest: My hand and seal of the United States District Court for the District of Nevada, at the Clerk's Office, at Carson City, County of Ormsby, State of Nevada, on the day and year last above written.

T. J. EDWARDS,

Clerk of the District Court of the United States, District of Nevada.

By H. D. EDWARDS,

Deputy.

Allowed this 22nd day of April, 1912.

[Seal] E. S. FARRINGTON,

Judge of the United States District Court, District of Nevada. [109]

[Endorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In

the Matter of Exploration Mercantile Company, a Corporation, Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank C. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Writ of Error. Filed April 22, 1912, at 5 o'clock and 30 minutes, P. M. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [110]

[Citation.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, a Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

United States of America,—ss.

The President of the United States, to Giant Powder Company, Consolidated, a Corporation, Pacific Hardware and Steel Company, a Corporation, and J. A. Folger and Company, a Corporation, Petitioners, by and Through P. F. Carney, and

J. L. Kennedy, Detch and Carney, and E. E. Roberts, Esquires, Attorneys for said Petitioners:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty (30) days from the date of this Writ, pursuant to a Writ of Error, filed in the Clerk's office of the District Court of the United States, for the District of Nevada, wherein H. V. Morehouse and I. S. Thompson, are plaintiffs in error, and you are the defendants in error, to show cause, if any there be, why the judgment in said Writ of Error mentioned should not be corrected, [111] and speedy justice should not be done to these plaintiffs in error in that behalf.

Witness, the Honorable E. S. FARRINGTON, Judge of the District Court of the United States for the District of Nevada, this 22 day of April, 1912, of the Independence of the United States, the one hundred and thirty-sixth.

District Judge of the District Court, of the United States, District of Nevada.

E. S. FARRINGTON,
Judge.

[Seal] Attest: T. J. EDWARDS,
Clerk.

By H. D. Edwards,
Deputy.

Received a copy of the foregoing citation this 26th day of April, 1912.

J. L. KENNEDY,
E. E. ROBERTS,
DETCH & CARNEY,
P. F. CARNEY,

Attorneys for Giant Powder Company, Consolidated, a Corporation; Pacific Hardware and Steel Company, a Corporation, and J. A. Folger and Company, a Corporation, Petitioners.

Good cause appearing therefor, it is ordered that the appearance day hereinabove named be, and is hereby extended, so as to include the 27th day of May, 1912.

E. S. FARRINGTON,
Judge. **[112]**

[Endorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc. Citation. Filed May 1st, 1912, at 9 o'clock A. M. T. J. Edwards, Clerk. **[113]**

[Praecipe for Record.]

In the District Court of the United States, in and for the District of Nevada.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, a Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson, and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, under the Writ of Error heretofore perfected in this cause to said Circuit Court, and include in said transcript the following:

The original Petition in Bankruptcy filed against the Exploration Mercantile Company; the Petition for Injunction; the Petition for Stay of Proceedings and for Injunction; Order of Court Staying Proceedings and Return of Service thereon; Order for Injunction; Injunction and Service thereon; Motion to Dissolve the Injunction; Affidavit on Motion to Dissolve Injunction; Order Entered on Hearing Motion to Dissolve Injunction; Demurrer to Original Petition in Bankruptcy; Order Sustaining Demurrer; Answer to

Amend Petition in Bankruptcy, and Demand for a Jury; Verdict of Jury in Bankruptcy; Order Declaring and Adjudging the Exploration Mercantile Company Bankrupt; Motion for Rule to Show Cause Why an Attachment for Contempt Should not Issue; Affidavit of P. F. Carney on Contempt; Order to Show Cause Why Defendants Should not be Adjudged Guilty of Contempt and Service; Answer or Affidavit of H. V. Morehouse to Order to Show Cause on Contempt; Answer or Affidavit of I. S. Thompson to Order [114] to Show Cause on Contempt; Answer or Affidavit of C. E. Wylie on Order to Show Cause for Contempt; Minute Entry of Hearing on Order to Show Cause for Contempt; Decision and Judgment of Court Finding Defendants Guilty of Contempt; Petition for Writ of Error; Assignments of Error; Bond on Writ of Error; Order Allowing Writ of Error; Writ of Error; Original Citation and Service; and this Praecipe.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and have same on file in the office of the Clerk of said Circuit Court of Appeals at San Francisco before the 17th day of May, A. D. 1912.

H. V. MOREHOUSE,
I. S. THOMPSON,
In Proper Person,
Attorneys for Defendants and Plaintiff in Error, H. V. Morehouse and I. S. Thompson.

[Indorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In

the Matter of Exploration Mercantile Company, a Corporation, a Bankrupt. And the Application of P. F. Carney in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt etc. Praecipe. Filed May 1st, 1912, at 10 o'clock A. M. T. J. Edwards, Clerk. **[115]**

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States for the District of Nevada.

No. 103.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation, a Bankrupt, and the Application of P. F. Carney, in Said Proceeding by Affidavit, and the Order of Honorable E. S. Farrington, Judge of Said Court, of Date July 9, 1909, Issued to W. C. Stone, C. E. Wylie, Frank G. Hobbs, I. S. Thompson, and H. V. Morehouse, to Show Cause Why They and Each of Them Should not be Adjudged Guilty of Contempt, etc.

I, T. J. Edwards, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that the foregoing one hundred and fifteen (115) typewritten pages, numbered from 1 to 115, both inclusive, are a true and full copy of the enrolled

pages, and of all proceedings in the matter therein entitled, and that the same together constitute the return to the annexed writ of error.

I further certify that the cost of this record is $148.70, and that the same has been paid by the plaintiffs in error.

Witness my hand and the seal of said court, this 18th day of May, 1912.

[Seal] T. J. EDWARDS,
Clerk. [116]

[Endorsed]: No. 2145. United States Circuit Court of Appeals for the Ninth Circuit. H. V. Morehouse and I. S. Thompson, Plaintiffs in Error, vs. Giant Powder Company, Consolidated, a Corporation, Pacific Hardware and Steel Company, a Corporation, and J. A. Folger & Company, a Corporation, Defendants in Error. In the Matter of Exploration Mercantile Company, a Corporation, Bankrupt. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Filed May 21, 1912.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

H. V. MOREHOUSE and I. S. THOMPSON,

Plaintiffs in Error.

vs.

GIANT POWDER COMPANY, Consolidated, a Corporation. PACIFIC HARDWARE AND STEEL COMPANY, a Corporation, and J. A. FOLGER AND COMPANY, a Corporation,

Defendants in Error.

In the matter of EXPLORATION MERCANTILE COMPANY, a Corporation, Bankrupt.

BRIEF OF PLAINTIFF IN ERROR.

This is a writ of error, prosecuted by these plaintiffs in error, for a judgment of conviction for contempt.

The facts are, that on the 6th day of August, 1908, one Walter C. Stone, a stockholder in the Exploration Mercantile Company, a corporation, under the laws of the State of Nevada, brought an action in the State Court, in due form, against the Exploration Mercantile Company (Trans., p. 64); that these plaintiffs were the attorneys for said Stone. That upon the commencement of said action, process issued, and was served, and said defendant duly appeared in said action, and that one C. E. Wylie, a stockholder and officer of defendant, was appointed receiver of said defendant. That at the time of such action, the defendant was a corporation having a capital stock of 50,000 shares, of which said W. C. Stone owned 48,000 shares, C. E. Wylie 1,000 shares, and Frank G. Hobbs 1,000 shares, so that the whole capital stock was held, owned and possessed by these three men (Trans., p. 101); that

they also constituted the Board of Directors (Trans., p. 101). That they all consented to, acquiesced in, upheld, ratified and confirmed the proceedings in the State Court (Trans., p. 103), and therefore all parties in interest were before the State Court in that proceeding; that said receiver gave due and proper bonds in the sum of $50,000 (Trans., pp. 29 and 51), and thus all creditors were protected from any act of the receiver; the receiver took possession of the estate of the defendant, and these plaintiffs in error acted for said receiver as attorneys, there being no conflicting interests in this litigation. The receiver was in possession from about the 6th day of August, 1908, until after the appointment of a trustee in bankruptcy, which was some time after the adjudication, which was on the 9th of July, 1909, when he turned over the estate.

On the 12th day of September, 1908 (Trans. filing marks, p. 7) these creditors filed an **involuntary** petition in bankruptcy against the corporation, Exploration Mercantile Company. This, as will be seen, was more than one month after the proceedings in the State Court. The only prayer (Trans., p. 6) was for a subpoena, and that the corporation be adjudged a bankrupt.

No bond was given, and no receiver asked, and no proceeding under the bankrupt or any other law taken, to acquire or divest the possession of the estate out of the hands of the State receiver. The estate was mostly a stock of merchandise of great value, and the business was conducted in rented premises, costing $500.00 per month rent. What was to become of this property? Who was to pay rent, and watchmen's fees, insurance, and protect the estate? Now, no stay order or injunction was asked in the petition. But an application was made upon the equity side of the Court for an injunction, in a separate proceeding (Trans. pp. 7, 8 and 9). In this application, the injunction is asked against the **corporation,** and **C. E.**

Wylie, receiver. There is no **averment** of a want of a plain, speedy and adequate remedy at law, or that Wylie or his bondsmen are insolvent.

And this petition for an injunction is not sworn to positively, but only (Trans., p. 10) that petitioner believes. At the same time a petition was filed for a stay of proceedings (Trans., p. 10), and was sworn to upon information and belief (Trans. p. 12). There **was no order** for an injunction, although one was issued by the clerk (Trans. p. 15), and the Court issued a stay order, under his own hand (Trans., p. 20). The injunction was "from further prosecuting said suit in said Court, and from taking any further step or proceeding in said action or suit now pending." (Trans., p. 16.) The restraining order was "to abstain from the sale of, or in any manner whatever disposing of, the property or estate or any part thereof." (Trans., p. 20.) This injunction and restraining order was served upon Stone, president of the corporation, and upon C. E. Wylie, receiver (Trans., p. 21). The restraining order was also an "order to show cause," and the **time** fixed for hearing was the 18th day of September, 1908, at 10 o'clock a. m. (Trans., p. 20), and ran until the "decision of this Court upon the motion." (Trans., p. 20.) Thereupon an affidavit for the dissolution of the injunction and restraining order was made and filed (Trans., p. 26 et seq.). And at the same time a demurrer was filed (Trans., p. 31), which was heard and **sustained** (Trans., p. 36), upon what ground does not appear, but it was sustained, generally. On the day fixed for hearing the motion to dissolve, etc., Sept. 18th, 1908, an appearance was made and a hearing had (Trans., p. 132), and not decided to this day (Trans., p. 127). There was no order made that we know of, or any minute entry, of a continuance for any purpose of the motion to show cause on the 18th day of September, 1908

Thereafter, the only steps taken in the State Court by way of prosecuting the proceedings in that Court, was by

way of **defense**, first, upon a petition filed in that Court by W. P. Fuller & Co., a creditor of the corporation (Trans., pp. 57 and 76), commanding the receiver to do certain things. This was the 26th of January, 1907. What could the receiver do but obey the order of that Court? The next act in the State Court was upon the iniation of these very creditors prosecuting this cause (Trans., pp. 59 and 60). This was the 18th day of March, 1909 (Trans., p. 59). After the proceedings in bankruptcy (Trans., p. 77) these very creditors filed their claims in the State Court and took steps therein (Trans., pp. 59 and 60). Now, under the proceedings in the State Court, neither the said Stone or the said receiver ever **prosecuted** any step upon their own motion—as provided in said injunction, which read "from taking any further step or proceeding in said action or suit now pending or from further prosecuting said suit in said Court." They initiated nothing.

Now, upon the sustaining of the demurrer, the petitioners amended their petition, and thereupon the corporation filed an answer and issue was made. In the meantime the receiver remained in possession of the estate, having closed the business, and the cause did not come on for trial until the early part of July, 1909.

In the month of December, 1908, the receiver paid these plaintiffs in error the sum of $1,000 for legal advice and assistance (Trans., p. 60), and this allowance was confirmed by the State Court, upon the proceedings taken by these petitioners (Trans., pp. 59 and 60) in that Court. No demand has ever been made upon plaintiffs in error for this money. Also, during this time, and after the injunction and stay order, the receiver paid out certain sums of money as rents (Trans., pp. 130 and 131), which said sums so paid was by the State Court allowed and ordered and confirmed, upon the proceedings in that Court, taken by these petitioners (Trans., pp. 59, 60 and 61).

The cause came on for trial, and on the 9th day of July,

1909, a judgment of adjudication was entered (Trans., p. 42). Thereupon, Mr. P. F. Carney filed his affidavit, upon which an order to show cause (Trans., p. 43) was made upon these plaintiffs in error why they should not be adjudged guilty of contempt of Court in disobeying the said injunction and order to show cause. This order to show cause came on for hearing on the 21st day of July, 1909, and these plaintiffs in error appeared and filed their answers by way of affidavits, which appear on Trans., pp. 45 to 79, and need not be set out here. The matter was heard before the Court, and on the 12th day of April, 1912, two years and eight months after the hearing, these plaintiffs were adjudged guilty.

The affidavit of Mr. Carney has no prayer (Trans., p. 25), and makes no demand for any kind of relief. It is entitled in the civil proceeding (Trans., p .14), and has no title or averments of a criminal character. We therefore set out nothing further by way of a statement of facts, as our brief will deal with facts and law in such manner as to fully cover this cause.

BRIEF OF PLAINTIFFS IN ERROR.

We will not take up our assignments of error in the order in which they are prepared in the transcript, because we think the Court will look into this matter, as to whether the Court, first, had any power in this proceeding to punish criminally; and, second, whether it had any power to punish civilly. That is, whether, upon this affidavit of Mr. Carney, it gave the Court any jurisdiction at all, the contempt, if any, being **constructive,** and not in the view and presence of the Court.

This point is made clearly by the XVII assignment of error. This Hon. Court in Morehouse vs. Pacific Hardware Company, 177 Fed. 337, being this very case, said, "was a **criminal** proceeding," and "a proceeding to punish for contempt committed in violation of an injunction issued in any suit or proceeding is a proceeding entirely distinct

and separate from that in which the injunction was issued." That this proceeding in a Federal Court is **purely a criminal proceeding**, seems to be settled beyond discussion. Being such, the petition upon which the proceeding is based must have a title of its own, and the **charge** and **prayer** must be as specific and precise as the indictment.

In S. Anagyrus vs. Anagyrus & Co., 191 Fed. 208, His Honor, Judge Van Fleet, had occasion to pass upon this very point and question, and his decision is the decision of this case, in behalf of these plaintiffs in error. Judge Van Fleet said, speaking of the petition for contempt in that case, "There is an entire lack of any prayer, demand or suggestion that respondents be punished in any manner." "It is very clearly essential in a proceeding seeking the punishment as for a criminal contempt, and especially should this be so where there is absence of anything else in the pleading to definitely point the nature of the judgment sought." "A criminal contempt is no part of the main case; it is a proceeding independent and apart in the nature of a criminal prosecution, and should have a title of its own, appropriate to indicate its character." Now in the motion for rule to show cause (Trans., p. 13) we find these words, "why an attachment should not issue against them for the disobedience of the orders of the Court." These words, "attached for contempt," are the same in Judge Van Fleet's decision. But in the affidavit of P. F. Carney (Trans., p. 25) there is, as Judge Van Fleet says, "no prayer, demand or suggestion that respondents be punished in any manner." It simply ends, "And further affiant saith not."

Thus we see that this case as held in Morehouse vs. Pac. Hardware Co., 177 Fed. 337, being this very case, is "a **criminal** case," and is "entirely distinct and separate from that in which the injunction was issued," and by Judge Van Fleet, "should have a title of its own," and

Judge Van Fleet quotes from and fortifies his position by the case of

Gompers vs. Buck Stove, etc., 221 U. S. 418.

Now, the title of this proceeding is, by the affidavit of P. F. Carney (Trans., p. 14), "In the matter of Exploration Mercantile Company, a corporation, An Alleged Bankrupt." In the order to show cause (Trans., p. 43), the title is, "In the matter of Exploration Mercantile Company, a corporation, An Alleged Bankrupt." And in the motion for rule to show cause (Trans., p. 13) the title is "In the matter of Exploration Mercantile Company, a corporation, An Alleged Bankrupt." We thus see there is no independent and separate title, no independent and separate proceeding, but is made a part of the original proceeding in bankruptcy.

In Gompers vs. Buck Stove, etc., 221 U. S. 418,

the Supreme Court of the United States said: "In the first place, the petition was not entitled 'United States vs. Samuel Gompers et al,' or 'In re Samuel Gompers et al,' as would have been proper, and, according to some decisions, necessary if the proceedings had been at law for criminal contempt. This is not **mere matter of form,** for manifestly every citizen, however unlearned in the law, by mere inspection of the papers in contempt proceedings, ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. He should not be left in **doubt** as to whether **relief** or punishment was the object in view. He is not only entitled to be informed of the **nature** of the charge against him, but to know that it is a **charge** and not a suit."

And Judge Van Fleet says: "These defects, therefore, partake of the **substance,** and render the moving papers **insufficient** to properly advise the respondents that they were charged with a criminal contempt, and consequently the record affords no sufficient foundation upon which to

base a judgment of a punitory character; and, as that would be the only alternative left to the Court under the facts, it follows that the rule must be discharged, and the proceeding dismissed." This case of Judge Van Fleet is exactly our case. In this, our case, we have no information. We are not asked to **pay** any losses or expenses of these creditors, or any damages, or that they have been to any expense or loss, or were or will be damaged, or that they demand any compensatory relief, or any relief, or that the purpose is to fine or imprison us, or that they want us punished. It must therefore be clear, under these authorities, that the judgment herein is unauthorized, void and beyond the jurisdiction of the Court to make and enter.

But further, the only power of a Federal Court to punish for contempt is Sec. 725, R. S. of U. S., and under that section the Court can only fine or imprison, as a **criminal** offense.

In Kirk vs. Milwaukee, etc., 26 Fed. 501,

the Court said: "Congress having legislated upon the subject of contempt and made a prosecution for contempt a purely **penal** proceeding, with **no provision** for **pecuniary** indemnity to a party injured, this Court, under the restraint of the Federal Statute, cannot enforce the State Statute. Thus the **remedial** character of the proceeding is taken away."

In U. S. vs. A. T. & S. F. Ry. Co., 16 Fed. 853,

it is said: "The power of the United States Courts, in matters of contempt, is limited by Sec. 725, Rev. Stat., to punish by fine and imprisonment. It has **no power** to impose any punishment by way of **damages** or **compensation** to the **plaintiff** in the original action."

In Exparte Robinson, 19 Wall. 512,

the U. S. Supreme Court says: "This enactment (Sec. 725) is a **limitation** upon the manner in which the power may be exercised and must be **held** to be a **negative** of all other **modes** of punishment."

In 16 Fed., **supra**,
the Court said: "This is a proceeding in its nature criminal, and must be **governed** by the strict rules of construction applied to criminal cases. Its purpose **is not** to afford a **remedy** to the party complaining, and who may have been injured by the acts complained of. That remedy must be sought in another way. Its purpose is to vindicate the authority and dignity of the Court. In such a proceeding the Court has **no jurisdiction** to make any order in the nature of further directions for the enforcement of the decree."

Van Zant vs. Argentine M. Co., 2 McCrary, 642.

Haight vs. Lucia, 36 Wis. 355.

N. O. vs. Steamship Co., 20 Wall. 392.

In re Childs, 22 Wall. 163.

Now Section 725, Rev. Stat., says: "And to punish by fine or imprisonment." This is the only mode of punishment and "negatives all other modes." It is therefore plain that a Federal Court is **limited** in contempt proceeding, by the Federal Statute, and can only fine or imprison, and cannot give remedial relief to the complainant. That it cannot indemnify these creditors. Such being the case, the proceeding must be purely criminal, and prosecuted as a criminal proceeding, and this is not a mere matter of form, but of substance. This proceeding is not prosecuted criminally, nor entitled "The United States vs. H. V. Morehouse" or "In re H. V. Morehouse," but is prosecuted in the original cause, and therefore these plaintiffs in error cannot be punished criminally, and the Court had no jurisdiction to indemnify these creditors. The judgment cannot stand. This point, it seems to us, is fatal to these proceedings, and therefore we have discussed it first.

II.

The first assignment of error (Trans., p. 163) had relation to the power of the present U. S. District Court, punishing as for a contempt, either civilly or criminally, an

alleged contempt, charged to have been committed against the old District Court of Nevada. Our contention is, that on January 1st, 1912, by the Act of Congress, entitled "An Act to Codify, Revise and Amend the Laws Relating to the Judiciary," approved March 3rd, 1911, the old District Court of Nevada was abolished, and forever ceased to exist on the 1st day of January, 1912, and that an entirely new District Court came into existence on that day, and that as the acts charged against these plaintiffs in error were all before the 9th day of July, 1909, the contempt, if any, fell with that Court, and that the new District Court has no power to punish these plaintiffs in error, and that the only Court which can punish for contempt is the Court whose order was disobeyed, for the rule is,

Vol. X, Pl. & Prac., p. 1099,

"The same Court which issued the injunction must inflict the punishment for contempt, where the injunction has been disobeyed."

Mr. Rapalje on Contempt, Sec. 13,

says, Sec. 13: "No Court can punish a contempt of another Court, notwithstanding the fact that contempts are regarded as offenses against the State, which, being granted, it would seem to follow that any tribunal having criminal jurisdiction should have power to punish them whenever committed anywhere within the territory over which that jurisdiction extends, yet it is a well-settled rule **that that Court alone** in which a contempt is committed, or whose order or authority is defied, has **power to punish it or entertain** proceedings to that end."

Now it will be seen, by the Act of Congress of March 3rd, 1911, which went into effect January 1st, 1912, that all the Districts Courts of the United States were abolished by the repeal of the Statutes creating them, and a new District Court (Sec. 94 of New Federal Judicial Code), and Sec. 297 (repealing clause) makes the present District Court of Nevada a new Court, and the only question is,

whether Sec. 299 of the new Code kept alive this proceeding, in such manner as to authorize the new District Court to pronounce judgment of conviction, for an offense of contempt, committed not against the new Court, but against a Court which has **ceased to exist.**

The rule we contend for is, that contempt of Court is not against the Judge, but the Court, for, as is said in

People vs. County Judge, 27 Cal. 151,

"The contempt complained was neither a contempt of the County Court, nor of the County Judge, but of the District Court in which the action was pending, and by whose authority, in legal contemplation, the writ of injunction was issued." Now the offense is "contempt of Court," not "contempt of a judge." The Court punishes. If, therefore, the Court has ceased to be, the contempt falls, and is at an end. By Section 297 of this new Federal Code, we read, as having been **repealed,** the following:

"All acts and parts of acts authorizing the appointment of United States Circuit or District Judges, or **creating** or changing judicial circuits or **judicial** districts, or divisions thereof, etc., enacted prior to February First, Nineteen Hundred and Eleven."

This shows a complete repeal of the old Court; and also said Section 297 further says: "Also all other acts, and parts of acts, in so far as they are embraced within and superceded by this act are hereby repealed."

Then the Court against which the contempt proceedings were charged, has ceased to exist. Now, can the new Court punish for an offense not committed against it, but committed against a Court no longer in existence? We claim it cannot.

In Exparte Bradley, 7 Wall. 364,

The U. S. Supreme Court said: "The Supreme Court of the District of Columbia has no **jurisdiction** to disbar an attorney for **contempt** committed before another Court.

Upon reading this case, it will be seen, that an Act

reorganizing the Court of the District of Columbia had taken place in the meantime, as here, and the brief of complainants says: "The Act of March 3rd, 1863, **abolished** both the Circuit and Criminal Courts of the District of Columbia, and **transferred** all their several **powers** and **jurisdiction** to the Supreme Court created to take their place. It prescribes in what manner the Supreme Court shall exercise those powers and jurisdiction. The Supreme Court holds the Criminal Court, and the law makes one Judge the Court for that purpose."

This is the contention which must be set up here. That Act, by Sec. 13 thereof, contains all that is found in Secs. 299 and 300 of the new Federal Code, creating the new Court for Nevada as to trials and continuances of pending suits. But the Supreme Court of the United States holds, "We do not understand the Judges of the Court below as contending that Judge Fisher, at the time of the conduct and words spoken by the relator before him, or in his presence, **was holding the Supreme Court of the District,** but was holding a Court distinct from the Supreme Court that possessed any power or jurisdiction over this contempt as complained of; **otherwise** the case would present the **anomalous proceeding** of one Court **taking cognizance** of an alleged contempt before and against another Court."

This seems to us to be decisive of this case. His Honor, Judge Farrington, sitting in this **new** Court, cannot take the anomalous position of taking cognizance of an alleged contempt committed before and against another Court.

In 9 Cyc. 30

It is said: One Court cannot punish a contempt against another Court or Judge. The offense is substantially criminal, and the power to punish is vested **alone** in the Court whose **judicial** authority is challenged."

In Kirk vs. Milwaukee, 26 Fed. 501,

It is said: "Proceeding a step further, it is a general and

elementary principle, in support of which authorities are not needed, that that Court alone in which a contempt is committed, or whose order or authority is defied, has the power to punish, or entertain proceedings to that end." (Citing Rapalji on Contempt, Sec. 13, 7 Wall. 365; 1 Yates 2, 26 Pa. St. 9.)

Now this last case, **supra,** is certainly to the point, because the proceedings for contempt were commenced in the State Court, and the cause removed to the Federal Court, and the Act authorizing removal authorized the Federal Court to **proceed** therein as if the suit had been **originally** commenced in said Circuit Court, and the **same proceedings** had been taken in said Circuit Court as shall have been had therein in said State Court prior to its removal."

Certainly the Act of Congress of 1911, repealing the old District of Nevada, and creating a new District Court, in Secs. 299 or 300, are no stronger or more efficacious than the Federal removal Act of 1875; and if the contempt on removal could not be punished, certainly the new Nevada Court cannot punish or entertain proceedings to that end, committed not against the new Court, but the old and abolished one. It must be plain that, as contempt of Court under Federal law is a **criminal offense,** that to authorize another Court, **after** the act, and repeal of the law creating the Court against whose authority the alleged contempt is charged to have been committed, would be **ex post facto,** and unconstitutional.

In re Littlefield, 13 Fed. 863,
The Court said: "Clearly one Court cannot punish a contempt against the authority of another. Citing 4 Pet. 108, 27 Cal. 151; 4 Cowan 49, and 1 Yates 2."

From these authorities it must be plain that the new U. S. District Court of Nevada has no authority or power to punish a contempt, which is not against its authority, but against the authority of a Court now not existing.

III.

Assignment V of Errors, we maintain is good and should be sustained, because by Sec. 720, Rev. St. of U. S., no Federal Court can issue an injunction against pending proceedings in a State Court, where the State Court was in possession of property, and had a prior possession and jurisdiction. This statute is absolute, and has only **one** exception, "except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." What law, then, relating to proceedings in bankruptcy have we? Certainly the bankruptcy act itself is insufficient. There must be some provision of the bankrupt law authorizing the injunction and stay order. When we look to the Bankrupt Act, we find only Sec. 11 of that Act, and that only allows a stay upon a **claim** for which a **discharge** would be a release, and Mr. Collier on Bankruptcy, Seventh Edition, p. 209, says:

"This dischargeability of the **debt** is made the **basis of jurisdiction.** There can be **no stay** under this section. unless the suit is **founded** upon a claim from which a discharge would be a release."

His Honor, Judge Farrington, in Trans., pp. 134, 135, says the proceedings in the State Court was "an insolvent act," and then says, "The dissolution of a corporation and the distribution of its assets certainly operate as a discharge of its debts." But that is not the **meaning** or **language** of the bankrupt act. The bankrupt act is speaking of a claim or debt, which can be **presented** by the plaintiff in the suit in the State Court, in the bankruptcy proceedings, and which **claim** would be **discharged,** not in the State Court, but in the bankrupt proceedings. That jurisdiction will attach in the Bankrupt Court upon the filing of the **petition is** not open for discussion—but that the Bankrupt Court will have **jurisdiction,** to issue an **injunction** or **stay order**—is open to question. The proceeding in the State Court may have been an insolvent pro-

ceeding, and yet to **enjoin** that proceeding in bankruptcy proceedings—to stay the State Court, as a Bankrupt Court —the suit must be upon a claim **dischargeable** in **bankruptcy.** Now the suit in the State Court was not upon a **claim** or **debt,** which a **discharge** in bankruptcy would be release. The corporation may be dissolved in the State Court, but the bankrupt law has no reference to the State proceeding, but the bankrupt proceeding. His Honor, Judge Farringon, refers to Hittel vs. District Court, 30 Nev. 382, but as these plaintiffs in error were the attorneys in that case, they certainly know why and upon what ground that case was decided. The **point** in that case was, not that the State Court had **no** jurisdiction, but as that the **order** appointing the receiver was **exparte** and before any kind of service, the **order** was void, because the directors and all persons interested were not made parties. If that case is law, then as the injunction and order **staying** proceedings, were **exparte** in this case, the Federal Court had no jurisdiction of any kind in the premises, so far as the injunction and stay order are concerned. The question in that case was **not** that the Court had **no jurisdiction,** but that the **exparte** order was without jurisdiction. So in Golden vs. District Court, 31 Nev. 250. In both these cases the question was not the jurisdiction of the Court, but the jurisdiction to make **certain** orders against parties not made parties to the proceedings, which said parties appeared in Court, and **objected** to the want of jurisdiction over them. This case presents no such question. The officers of the corporation in this case were the only stockholders and directors (Trans., p. 101). They held all the stock, and constituted the Board of Directors, and (Trans., p. 103) acquiesced in, upheld and ratified and confirmed the said proceedings and application for the appointment of a **receiver.** Thus the right **set forth** in the amended petition for bankruptcy depended upon the **full action** of all parties interested to make the action in the State Court

a **corporate** act. The whole **theory** that the **petition in** the State Court was the action of the **corporation**, was the basis of declaring the act a **corporate act,** under Section 3, sub. div. 4, Bank. Act, "being insolvent applied for a receiver," etc. If the State Court had **no jurisdiction**, it did not **apply for a receiver.** No Court can hold honestly that a **proceeding** in the State Court was a legal and valid proceeding, constituting an **act** of **bankruptcy,** and at the same time hold that the State Court had no **jurisdiction.** If the State Court had no jurisdiction then there **was no proceeding** in the State Court, and this proceeding **utterly fails,** because it is based **solely** upon that proceeding, being an **act of bankruptcy.** For the proceeding in the State Court, to be an act of bankruptcy—the proceeding in the State Court must be a **legal** act, and **jurisdictional.** If **illegal** and **without jurisdiction,** then it was no act and could not be the **foundation** of a bankruptcy proceeding, and this **bankruptcy** proceeding is based **solely** upon the proceeding in the State Court, being in **itself** an **act** of bankruptcy.

It is therefore plain, that to **sustain** the **bankruptcy** proceeding **at all,** or any right in the premises, it must be **admitted** that the State Court **had jurisdiction,** for if the State Court **had no** jurisdiction, then the bankruptcy fails utterly, as it is **founded** upon the proceedings in the State Court, being **an act of bankruptcy,** and if that Court had **no jurisdiction,** its orders and decrees were nullities, and there was **no act of** bankruptcy committed. This is too plain for argument or the citation of authority. It must then be admitted the State Court had **jurisdiction,** and such being the case, the only power of the Court, as a **Court of bankruptcy,** was Sec. 11 of the bankrupt act. True, it could exercise certain **equitable** jurisdiction as a Court of **equity.** Therefore, its jurisdiction, not being found in any special provision of the bankrupt act, its **jurisdiction** is made to depend upon its **powers** as a Court of Equity, and by

Sec. 723, R. S. of U. S.,

"Suits in equity shall not be sustained in either of the Courts of the United States, in any case where a plain, speedy and complete remedy may be had at law."

The petition in bankruptcy sets up no claim or demand or prayer for an injunction or restraining order, and neither Stone, Wylie, Hobbs or these defendants are made parties thereto. The only defendant is a corporation. The only prayer is for a subpoena and adjudication in bankruptcy. Therefore, taking the petition in bankruptcy as a bill in equity, there is nothing upon which to base an injunction or stay order. The petitioners evidently so understood, and for that reason Mr. Kennedy files an **affidavit,** and upon that affidavit, and that **alone,** the restraining order and injunction are issued. But under Sec. 723, R. S., **supra,** the Court's **jurisdiction** to issue such orders **depended** upon the absence of any "plain, speedy and complete remedy at law." If such remedy existed, then the Court **has no jurisdiction** to make orders, because the Federal Statute is prohibitive. It will be seen in Mr. Kennedy's affidavit (Trans., pp. 7 to 9, 11 and 12) that there is no averment of **insolvency,** or the **absence** of a **plain, speedy** and **adequate remedy,** but that C. E. Wylie "qualified, and now is the qualified and acting receiver of the assets," etc., thus showing that Wylie must necessarily be under heavy bonds, to be a receiver of the State Court, and that the petitioning creditors would be freely protected by such bond—but be that as it may, the Bankrupt Act provides in itself a plain, speedy and complete remedy, by

Sec. 69 of the Act.

This section is made specially applicable to **involuntary** petitions. By its very terms, it contains the things and averments set out in the affidavit of Mr. Kennedy. Congress knew that an injustice and wrong had been done persons under the former bankrupt laws, in **involuntary** petitions (In re Ward, 104 Fed. 985; In re Wells, 114 Fed.

222), and owing to the **new law,** fixing a new rule, by defining (Sec. 1, sub. div. 15, Bankrupt Act), "a person shall be deemed **insolvent** within the provisions of this act whenever the aggregate of his property, etc., shall not at a fair valuation be sufficient in amount to pay his debts;" that the alleged bankrupt, upon trial and hearing, might not be a bankrupt at all, and for that reason also, this new law,

Sec. 70, Bankrupt Act,

Makes the **vesting** and **title** of the bankrupt's estate **vest** in the trustee, in **involuntary** proceedings, not upon the filing of the petition, but "as of the date of adjudication." These changes in the law made it necessary to provide some means for the protection of creditors, between the **filing** of the **petition** and the **adjudication,** and also to **protect** the alleged **bankrupt** in case he was not adjudged bankrupt.

Mr. Collier, 7th Ed. Bankruptcy, 807-808, says: "The filing of an involuntary petition does not **ipso facto** take from the alleged bankrupt his dominion over his property; while his disposition of his property may be invalidated and set aside under certain circumstances, such property remains under his control until the adjudication. The remedy of the petitioning creditors in case this freedom of trade is abused, is by the appointment of a receiver under Sec. 2 (3) (15) or an appropriate proceeding under Sec. 3 (e) or Sec. 69."

Thus it is seen that by Sec. 69, Sec. 2 (3) (15), or Sec. 3 (e) of bankrupt act, the petitioning creditors could give bond and have either the marshal or a receiver appointed, and could protect themselves fully. This, then, was by the bankrupt law **itself** a plain, speedy and complete remedy.

In Indian L. & Trust Co. vs. Shanfelt, 135 Fed. 484, it is said: "The Constitution and Act of Congress deny the national Court's **jurisdiction** in equity where the complainant has a plain, speedy and complete remedy at law." And also says: "Although this objection to the jurisdic-

tion in equity of a national Court is not made by demurrer, plea or answer, or suggested by counsel, **it is the duty of the Court** of its own motion, and to give it effect."

(Citing 23 Wall. 466 and 19 How. 271.)

It will thus be seen that this case holds squarely that a plain, speedy and complete remedy at law is **jurisdictional**, and that where such remedy exists the Court, as a Court of equity, has no **jurisdiction.** Therefore, the Court had no **jurisdiction** in this case to issue the restraining order or the injunction. **They were and are void.** The violation of **void** orders is not a contempt.

In Hyde vs. Baker, 108 Am. St. 865,
it is said: "Equity **jurisdiction** will not attach where there is a full, complete and adequate remedy at law, even when fraud is alleged."

In Abernathy vs. Oston, 95 Am. St. 774,
it is said: "A suit in equity cannot be maintained where there is a plain, speedy and adequate remedy at law."

In Kiely vs. McGlynn, 21 Wall. 503,
"Equity will not entertain jurisdiction where there is an adequate remedy at law."

In Scott vs. Neily, 140 U. S. 106,
"A suit in equity cannot be sustained in a Federal Court, where there is a plain, adequate and complete remedy at law."

In Oelrichs vs. Fred May, 15 Wall. 211,
The Supreme Court of the U. S. says: "Where there is a complete remedy at law, a bill in equity must be dismissed. This objection is regarded as **jurisdictional**, and may be enforced by the Court **sua sponte**, though not **raised** by the **pleadings**, nor **suggested** by counsel

In Grand Chute vs. Winegor, 15 Wall. 373,
"When full and adequate relief can be obtained in a suit at law, a suit in equity cannot be maintained."

In Littlefield vs. Ballon, 114 U. S. 190,
"A bill which sets up a cause of action on which there is an

adequate remedy at law fails for want of equitable **jurisdiction.**"

That a plain, speedy and complete remedy at law is **jurisdictional** in the Federal Courts, we call attention to

Lawyers' Ed. Digest, Sup. Ct. U. S., Vol. 3, p. 2726,

where several hundred cases are cited to that effect. Therefore, where there is a plain, speedy and complete remedy, provided by the bankrupt law itself, there is **no jurisdiction** to issue either the restraining order or the injunction, and where there is no **jurisdiction** the orders **are void**, for, as is said

In re Ayers, 123 U. S. 443,

"When a Court of the United States undertakes by its **process of contempt** to punish a man for refusing to comply with an order which that Court had no authority to make, the order punishing him for contempt is void." The prisoner was discharged upon **habeas corpus.**

Exparte Fisk, 113 U. S. 713;
Exparte Virginia, 100 U. S. 339;
Exparte Rowland, 104 U. S. 604;
Exparte Paris, 93 U. S. 23;
Exparte Wilson, 114 U. S. 417;
Exparte Carll, 106 U. S. 521;
Exparte Yarbraugh, 110 U. S. 651;
Exparte Sichold, 100 U. S. 343;
Exparte Rowland, 104 U. S. 604.

We therefore earnestly contend that these orders were beyond and in excess of the jurisdiction of the Court, and were therefore void.

IV.

It will appear beyond question that the restraining order and the injunction are issued **only** upon the affidavit of Mr. Kennedy. From that affidavit it will be seen there is **no** averment of the **insolvency** of C. E. Wylie, the receiver of the State Court. He may have been **personally** perfectly responsible in an an action at law for damages.

He was the receiver of the State Court, and the Court had the right to presume that he was under **bonds**, and that such bonds was full and adequate protection to these creditors; and further, while an attorney no doubt can make the affidavit for his clients under the circumstances set out in Mr. Kennedy's affidavit, yet we claim he cannot make such affidavit upon **information** or **belief**. He must verify upon his **own knowledge**. He says (Trans., pp. 9, 10 and 12), "that the statements contained in the foregoing petition are true, **as he believes.**" He does not aver **any knowledge** of his own, or that he has **any information.** The question then arises, can this **affidavit** be the **foundation** for any proceeding?

In In re Vastbinder, 126 Fed. 417,

it was held the affidavit should be **positive** and based upon the **knowledge** of the attorney. True, that was a case arising upon the demurrer, and the demurrer was sustained. The sustaining of the demurrer proved the affidavit as insufficient. But in this, our case, there was no **opportunity** for demurrer. The Court acts **exparte.** Did the Court then have **jurisdiction** to act upon an **affidavit** which swears to nothing?

Mr. High on Inj., 3rd Ed., Sec. 1567,

"Nor will it suffice that the material facts constituting the equity on which the injunction is sought are verified by complainant **upon** information and belief; they should be **positively** sworn to.

In Campbell vs. Morrison, 7 Paige 157;

Lawyers' Co-op. Pub. Co., Vol 4 (N. Y. Ch.),

there is a long citation of authorities that such an affidavit is wholly insufficient, and that an injunction should not be granted.

Now the Court finds that on the 18th day of September, 1908, a motion was made to **dissolve,** and that such motion is not yet decided, this decision of the Court being April 12th, 1912, being more than three years and six months,

that such motion to **dissolve** remains in the breast of the Court, and yet **defendants** had done all they could to **show good faith** and **honest purpose** on their part, they being placed in the meantime between **two fires**; the State Court having in the **first instance** statutory and proper jurisdiction, and these **defendants** amenable to its **orders** and **decrees**; and the Federal Court, having jurisdiction also, and these defendants amenable to its orders and decrees. What could these defendants do more than to move to dissolve? If the Federal Court had at once passed upon the motion to **dissolve**, and either **granted** or **refused** the motion, then these defendants could have acted with knowledge. But the Court left them in **doubt** and **uncertainty**, and in the meantime, not upon their own initiation, but upon the **initiation** of (see affidavit of Thompson, Trans., p. 57) W. P. Fuller & Co., a creditor of said alleged bankrupt corporation, Jan. 26th, 1909, the State Court made an order directing and commanding its Receiver Wylie, etc., and these defendants were the attorneys of said receiver. What could Wylie or these defendants do? Had they disobeyed that order, they would be in contempt of the State Court! Now on the 18th day of March, 1909, **these very** creditors (see Thompson's affidavit, Trans., p. 59) go into the State Court and file a motion and notice of motion, thus bringing Wylie, receiver, and these defendants into that Court to act. Again they must obey the State Court or be in contempt. What shall they do? Have they no right of judgment? Mark you, this last **proceeding** in the State Court is the **act of these** petitioning creditors. They are the prosecutors of these defendants. They seek and obtain **the adjudication** of the State Court upon the $1,000.00 fee allowed these defendants, and then ignore their own acts, and **the adjudication** of the State Court, and ask the Federal Court to punish these defendants, and in the meantime, and long **prior thereto**, these defendants have appealed, by a motion to dissolve,

to the Federal Court, so they may be informed how to act, and that Court fails to act, leaving these defendants in the position that they are compelled to act upon their judgment as lawyers, having at least some knowledge of the law; they firmly believe: 1. That the affidavit of Mr. Kennedy was insufficient to warrant an injunction or the issuance of a restraining order; 2. That the cause of the State Court was not based upon a "claim" dischargeable in bankruptcy; 3. That the equitable jurisdiction of the Federal Court could not be invoked **exparte**; 4. That equitable jurisdiction could not be invoked without compliance with Rule 55 in equity; 5. That no **order** being made to continue the motion for an injunction, that it failed to be effective; 6. That under Sec. 719, R. S. of U. S., the order and injunction was at an end; 7. That by virtue of Sec. 20, R. S. of U. S., that although this was a bankrupt proceeding, the Court had no power to issue the stay order and injunction, because this was an **involuntary** proceeding in bankruptcy, and that as the **State Court** already had **jurisdiction,** and was in **possession** of the estate, it would have the right to hold and deal with the same, through its **receiver, until an adjudication** in bankruptcy, and that under the **present** bankrupt law, the **possession** and **control** of the **estate** could not pass into the Federal Court until such **adjudication,** except by the giving of a bond, and the appointment of a receiver in the Federal Court, which was not done, and that these reasons would appeal to the Federal Court, and the Hon. Judge of that Court would **dissolve** his orders, and if he did not, these defendants would not be guilty in obeying the action of the State Court or advising or proceeding therein, under the decision of the Supreme Court of the United States in

Exparte Watts, 190 U. S. 1,

where it is said: "They could not be found **guilty** of **contempt,** because they believed and declared their belief that the State Court had jurisdiction, and the District had not.

Granting that they were mistaken, it does not follow that their mistaken conviction constituted contempt. In point of fact, the State Court agreed with them, and would certainly not have entered orders of whose validity it entertained any reasonable doubt." "In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error of judgment. The **preservation** of the **independence** of the bar is **too vital** to the due administration of justice to allow of the **application** of any other general rule."

Also: "It has been already assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvent estate in the State Court, **but it remained for the State Court to transfer the assets, settle the accounts of the receiver and close its connection with the matter."**

Here was the clear and plain decision of our highest Court. What was to be done? No bond had been given by the crediors. No Federal receiver had been appointed. No adjudication had taken place. The estate had to be protected. Bills and rent had to be paid. The attorneys were entitled to be paid. And the State Court had the right to adjust these matters **before** turning over the estate to the Federal Court, and yet defendants are found guilty of contempt, when the **creditors** could have had a **receiver,** and the Federal Court could have passed **at once** upon the motion to **dissolve.** Besides, it will be seen by this brief, that the law upon which these defendants relied was not a mistaken belief, but was and is the law. They did not intend any disrespect to the Court, but acted between two fires, and acted upon the law as they understood it and still understand it, and also upon the belief that the Court could not and would not deny the motion to dissolve. We feel we are not in contempt.

V.

Again, where there is a **failure** of either pleading or proofs, there can be no decree. If either is wanting, the decree or judgment is **void.**

Waldron vs. Harong, 102 Am. St. 959;

Twin vs. U. S. Dist. Att'y, 119 Am. St. 354.

The only pleading or proof to give the Court jurisdiction to make the orders in question was the affidavit of Mr. Kennedy. That affidavit is upon **belief,** solely, and Mr.

High on Inj., Sec. 1567, 3d Ed.,

says: "Now will it **suffice,** that the material facts **constituting** the **equity** on which the injunction is sought are **verified** upon **information** and **belief,** but they **must be positively** sworn to." No affidavit of **facts** or **truth** was presented. No **oral or true** facts were before the Court. There was no **proof** of **any kind.** Just the **belief** of Mr. Kennedy.

In Campbell vs. Morrison, 7 Paige, 157,

the Court says: "The **material** facts constituting the only equity upon which the injunction rested were not **verified** in such manner as to authorize the issuance of a general injunction **exparte** to **stay** the defendant from proceeding until a regular answer could be put in. The complainant does not **profess** to **know** any of the facts upon which his application for an injunction is founded."

Here in our case **no fact, material** fact, or otherwise, is sworn to **positively.** The equity of the receiver's solvency or insolvency is not averred; that there is no plain, speedy or complete remedy at law is not averred; the only attempted equity is **irreparable injury,** and the **facts** of how or why or wherein **irreparable injury** would occur is not stated. There is only a **fear** that the goods, wares and merchandise may be dissipated, and thereby an **irreparable** injury be sustained. There is no averment that the receiver of the State Court is not perfectly responsible; that he cannot answer fully in damages; that his acts are

not for the best interests of all the creditors; that he **has no bond**; that the creditors are not fully protected, or that there has been, or will be, any loss.

In Thorn vs. Sweeney, 12 Nev. 251,

Judge Hawley says: "It is **not sufficient** that the complaint alleges that the injury would be irreparable. The plaintiff must **affirmatively** show **how** and **why** it would be so." Now suppose all the facts as set out in the affidavit are true, how could the petitioners be irreparably injured? They must show such **injury** affirmatively. Not leave it open to guess. The loss in the goods, wares and merchandise may be fully protected by the receiver's bond. The new purchases made by him may be of a far **greater value.** They may be decidedly advantageous.

Now, what is an irreparable injury?

Judge Van Fleet, in

Kellogg vs. King, 114 Cal. 378,

says: "An injury is irreparable when it is of such a nature that the injured party cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard."

What fact is there in this affidavit which shows any such state of things? Not one. The mere averment or use of the word does not suffice. The facts must appear. Why could not the petitioners be **compensated** in damages? We do not know. This Court cannot tell. Why cannot the loss be measured by a **pecuniary** standard? We do not know. This Court cannot tell. When we look, then, at the affidavit, there is **not a fact** or any **proof of anything** to give the Court **jurisdiction** to **exercise** its powers as a Court of equity. There was no **jurisdiction** in the Court to make the orders, for, as is said in

Waldron vs. Harvey, 102 Am. St. 963.

"But there must be jurisdiction of the **matter acted upon** by having it also before the Court in the pleadings." "If

either is wanting the decree or judgment is **void**, not merely voidable or erroneous."

Works on Jurisdiction, p. 30, Sec. 11,

says: "Jurisdiction of the **subject matter** is obtained by the filing of such pleading or **petition** as will bring the action within the **authority** of the Court.

Now this **petition** or **affidavit** contains nothing which brings it **within** the **authority of the Court**, and certainly this is true, when Sec. 723, R. S. of U. S., **prohibits** the Court from entertaining a proceeding in equity, where there is a plain, speedy and complete remedy at law, and the **absence** in the affidavit of any affirmative showing that there is no such remedy is jurisdictional, and the Court had no **power** to make the orders, and **they are void.** It will be observed that by General Orders in Bankruptcy, No. 37, it is provided:

"In proceedings in equity for the purpose of carrying into effect the **provisions** of this Act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be."

It cannot be denied that the issuing of a **restraining order** or any **injunction** is purely a matter in equity.

Now, by Rule 55 in Equity,

Collier on Bankruptcy, 7th Ed., p. 1113,

We read: "But special injunctions shall be granted **only** upon due notice to the other party by the Court in term, or by a judge thereof in vacation, **after a hearing**, which may be **exparte, if the adverse party does not appear** at the time and place ordered."

From this rule, which is laid down by the Supreme Court of the United States, and such rule being law, for, as is said in

Rio Grande, etc., vs. Gildersleeve, 174 U. S. 603,

"A rule of Court has the force of law, and is binding upon the Court, as well as upon the parties to the action."

It is **apparent** the Court could not issue an **injunction**, except **after** a **hearing**, upon an order to show cause. If the party **noticed**, fails to appear, then the **injunction** may issue **exparte**, but **not otherwise.** This rule is **binding** upon the Court. It cannot modify or escape it. It is **jurisdictional.**

Drew vs. Hogan, 26 App. Cas. (D. C.) 55.

Now, when we examine the proceedings herein, we find that the writ of injunction was issued **exparte, without notice, without any hearing,** and so far as the record shows, without even an order therefor; while the rule requires notice, and can **only** be issued upon **due notice,** which of course requires a **time** and **place** to be **fixed,** so that the party can **appear** and **show cause.** The Court, under this rule, which is a **law binding** upon the Court, had **no authority** or **power** to issue the **injunction.** There was, therefore, no **injunction** to be disobeyed, and defendants cannot be in contempt of the **injunction.** This is not a question of **irregularity,** but of **power** and **jurisdiction.**

For, as said by the District Court of Appeals (D. C.), 26 App. Cases 55:

"The original order in this case was granted **exparte,** and the defendant had the right to presume that the Court had obeyed its own rules. Parties to suits and their attorneys are justified in presuming that the Court will not violate its own rules." And in that case the Court held that the judgment for **contempt** was void, because the order of the Court granting an injunction, without bond, **when the rule required a bond,** was a **void order,** because the rule had the force of law, and was **jurisdictional.**

So here, the rule 55 in Equity, **prohibits** an injunction, except **"upon due notice"** and **"after a hearing."** No notice was given; no hearing had. The rule is specific. It is clear, plain and emphatic. The Court therefore had no

power—no jurisdiction to issue an injunction. The injunction was **void.**

And a person is not in contempt for disobeying a **void** order.

Exparte Fisk, 113 U. S. 713;

In re Ayres, 123 U. S. 443.

If, therefore, the injunction was void, the defendant can only be punished for violating the **restraining** order. But the restraining order only **extended** to the 18th day of September, 1908, at 10 o'clock A. M. (Trans., p. 20), and this order shows upon its face that no injunction had been issued, for it says, "the act **sought** to be enjoined," and "against whom an injunction is prayed."

Now, how long does a restraining order last? A restraining order is not an injunction. It fixes its date. If it is not heard on that date, or not kept **alive** by some further order, it ends, for, as Judge Field says, in

Hicks vs. Michel, 15 Calif. 107,

"An order dissolving it, is not necessary. It ends naturally with the motion."

In Exparte Grimes, 94 Pac. R. 668,

no one **appeared** at the **time fixed** in the order, and nothing was done, but parties were held **in contempt** for disobeying the order, after the time fixed for hearing, and they were discharged upon **habeas corpus**, notwithstanding the order provided **"until the further orders of this Court and the judge thereof and the hearing upon said application for a temporary injunction herein."**

In Miles vs. Sheep Rock Mining Co., 49 Pac. 536,

the Supreme Court of Utah says: "If upon the **date** so fixed, there is no appearance, and no **continuance** of the hearing of the **motion for** the **injunction**, the restraining order **falls** with the motion. Under such circumstances it requires **no order** of Court to **dissolve** the restraining order. Its life ceased with that of the motion, for such an order is not intended as an **injunction pendente lite**, and is

not an injunction within the meaning of the provision of the Statute above cited."

Now, by Section 718, R. S. of U. S.,

We read: "Whenever **notice** is given **of a motion** for an injunction, etc., the Court or judge thereof may, etc., grant an order restraining the act sought to be enjoined, until the **decision upon the motion."** But the record herein does not show **any motion** for an injunction. It shows a **petition,** asking for an injunction or restraining order, and a restraining order, and also an injunction, a time fixed for a hearing of a motion, but what motion, we are left to conjecture, but **presume** a motion for an injunction; but at the same time of the order, an injunction is issued by the clerk, and by

Sec. 719, R. S. of U. S.,

An injunction issued by a District Judge shall not "continue longer than to the Circuit Court next ensuing, unless ordered by the Circuit Court." This section also provides who may issue injunctions. It limits the issuance of injunctions, 1st, to judges of the Supreme Court; 2nd, judges of the Circuit Court, and 3rd, Judges of the District Court, but only as a judge of the Circuit Court, and when issued by a judge of the District Court it can only run to the Circuit Court next ensuing—because such equity powers do not belong to the District Court as a District Court, and it will be seen by

Sec. 563, R .S. of U. S.,

that the only equity jurisdiction granted the District Courts of the United States is, 1st, to enforce liens in behalf of the U. S. for an internal revenue tax, and, 2nd, to redress rights of persons of **color,** etc. Thus leaving the jurisdiction in **equity** to the Circuit Courts. Therefore, while the District Court could under Sec. 718 of the R. S. of the U. S. issue a **restraining** order for the purpose of **hearing a motion** for a temporary injunction, its action in the premises upon the injunction is not the action of the District Court,

but the action of a District judge sitting as a Circuit judge, and the District judge so acting can only make an injunction or restraining order under Sec. 719 R. S. of U. S., which shall continue to the Circuit Court next ensuing—at which time some proceeding must be had in the Circuit Court, or else the **restraining order** and **injunction** both fall. This seems so plain to us that it cannot be open for argument, for, as is said by Chief Justice Marshall in

Parker vs. Circuit Court, 12 Wheat. 562,

"The act which authorizes District judges to grant writs of injunction provides that the same shall not, unless so ordered by the Circuit Court, continue longer than to the Circuit Court next ensuing." An order for its continuance, therefore, ought to have been made; and after the close of the term without such an order, an execution might have been sued out on the judgment **without any contempt of the Court."**

Now by

Sec. 572, Revised St. of U. S.,

Sec. 120, Desty Fed. Procedure,

the terms for the District Court for Nevada are the first Monday in February, May and October, and by Sec. 121, Desty Federal Procedure (19 U. S. Statute 4), the terms of the Circuit Court for Nevada are the third Monday in March and the first Monday in November. Therefore, the restraining order and injunction could **not continue longer** than the first Monday in November, 1908. As the restraining order and the injunction both were issued September 12th, 1908, they **both expired** on the first Monday in November, 1908, because **no action** of any kind was then taken—no order made—and no injunction or ruling had. And it will be seen by the petition herein and the decree of the Court, that all the **acts charged** to have **been done** by these defendants were **all after** the first Monday in November, 1908, and therefore, under the rul-

ing of Judge Marshall, **supra,** might have been done **"without any contempt of Court."**

Now, the phrase in the restraining order "until the decision of this Court upon the said motion," cannot extend the time beyond "the first Monday in November, 1908," because at that time the power of the District judge ended, and the Circuit Court stepped in, under the Statute, Sec. 719, R. S. U. S., and the motion would **fall** unless some steps were then taken to keep it alive, and nothing was done, and the Court finds in these words, "And said motion has never been decided;" that is to say, the motion of defendants, to dissolve the restraining order and injunction has not been decided, but what became of **petitioner's** motion for **the injunction?** Was that heard? Was that brought up? Was that continued? Was that acted upon? Was any order made in that behalf? Can a Court hold a decision on one motion, and thus constitute action upon some other motion? Certainly the motion of these defendants is not the motion for an injunction. The restraining order is not dealing with a **motion** of the defendants, because that is **not the motion** mentioned in the restraining order, and therefore we ask what became of the motion for the injunction? The taking under advisement a motion to dissolve does not constitute action upon the petitioner's motion, because they have both a restraining order and an injunction, and the two motions do not include the same subject matter, or call for the same action. They say we want an injunction. Upon such motion the Court is called upon to say whether an injunction shall be granted or not. The defendants' motion is based upon a **dissolution** of orders and proceedings **already had**—not something to be done—not a motion to be heard; but to set aside **action** already taken, and therefore taking under **advisement** a motion to dissolve, being **submitted** is not action upon a motion **for** an injunction. What became of that motion?

In San Diego W. Co. vs. Steamship Co., 101 Cal. 216,

the Court held that the words "until the further order of this Court could not prolong the restraining order beyond the pending of the motion for an injunction.

In Hicks vs. Michel, 15 Cal. 107,

the order contained the words, "until the hearing of the whole matter," and the Court said: "The concluding words of the order do not operate to change it into an injunction pending the suit. They only refer to the whole matter on the motion, and not to the whole matter in controversy." So here, "until the decision of this Court upon the **said motion,"** does not refer to any motion, but "said motion," and unless the Court acts upon **"said motion"** it expires on the day fixed, and there is nothing in the record of the Court showing any action upon **"said motion."**

In Miles vs. Sheep Rock M. Co., 49 Pac. 536,

the Court says: "If upon the date so fixed there is no appearance of the parties, and **no continuance** of the hearing of the motion for the **injunction,** the restraining order **falls with the motion."** In our case, an appearance was made, but there **was no continuance of the hearing of the motion for the injunction.** On the contrary, the Court finds "a motion was made (upon the date fixed) to dissolve both of said restraining orders; that said motion (that is, the motion to dissolve) was duly argued by the respective parties and submitted, and that said motion has never been decided (Trans., p. 90)." But not a word is said about **continuing the** restraining order. No order was made as to that. It was then necessarily at an end.

In Exparte Grimes, 94 Pac. 668,

"A restraining order ceases to be operative at the expiration of the time fixed by its terms," and this case is very instructive, because it shows that the phrases "until the further order of the Court," "in the meantime," "until the hearing and decision of the application," all mean the

same thing, and that the order falls of its own force, unless the motion is continued or kept alive in some mode, "although the restraining order provides that it shall be effective until further order." Here, then, the restraining order fell on the 18th day of September, 1908, at 10 o'clock A. M., because no motion was made to continue it, and no order of continuance was made. Now, in

Houghton vs. Courtelyon, 208 U. S. 149,

the Court construes Sec. 718, R. S. of U. S., the same as we do, and that a **restraining** order is not an injunction, and also Rule 55 in Equity as to **notice,** the same as we do, and that decision shows by the quoted opinion of the Court of Appeals of the District of Columbia that the restraining order ended, even though the words "until the further order," etc., was in the order, and says: "When the further order was made **nothing was said of the restraining order.** A new and permanent injunction in favor of the plaintiffs was granted. This decree necessarily superceded the restraining order, and it expired by the limitations contained in its terms."

So here, when the motion of the defendant was submitted, **nothing was said of the restraining order, and the order expired.** We submit, 1st, that as no order was made continuing or speaking of the restraining order, it ceased its force and became nothing on September 18th, 1908; and, 2nd, that if it did not, then it ceased absolutely on the first Monday in November, 1908, because the District Court could only make an order until the beginning of the ensuing term of the Circuit Court, and as nothing was then done, the restraining order and injunction both ended.

But it may be claimed that this was a **bankruptcy** Court, and that the Court had special statutory powers. The answer to that is, that by General Orders in Bankruptcy, No. 37, the Rules in Equity prevail for the "enforcing the rights and remedies" given by the bankrupt act. Therefore if this be a **right** or a **remedy** flowing from

the bankrupt act, that right or remedy must be under Sec. 718, R. S. of U. S., and Rule 55 in Equity.

But it may be claimed that Sec. 11 of the bankrupt law provided for **staying** suits, and the restraining order was made under that section. True, a stay of proceedings may be had, but only those proceedings which are **founded** upon a **claim dischargeable** in bankruptcy.

Mr. Collier, 7th Ed. on Bankruptcy,

says: "(a) Depending on dischargeability of debt. The section under consideration provides for the stay of a suit founded upon a claim from which a discharge would be a release. This dischargeability of the debt is made the **basis** of jurisdiction. There can be no stay under this section unless the suit is founded upon a claim from which a discharge would be a release."

Mackel vs. Rochester, 135 Fed. 904;
In re Cole, 106 Fed. 837;
Tenn. Pro. Co. vs. Grant, 135 Fed. 322;
In re Lawrence, 163 Fed. 131.

We are not arguing that the bankrupt Court cannot punish for contempt for the violation of its **lawful** orders, but we are contending that its orders in this case are **not lawful.** The Court had **no jurisdiction** to make them, and that if it had, both the restraining order and the injunction had spent their **force,** and **ceased** to be **effective,** before any of the **charges** alleged to be a contempt had taken place. We feel **confident** of the accuracy of our position.

VII.

But the law is well settled that an injunction, issued before judgment, **pendente lite, ends** with the judgment, unless **specially** continued. Now the **judgment of adjudication** was entered in this case on the 9th day of July, 1909 (Trans., p. 42), and therefore on that date both the restraining order and injunction fell with the judgment.

Vol. X, Pl. & Prac. 1029,

It is said: "A preliminary injunction is abrogated by

the final decree, and any restraint thereafter desired should be inserted in the final decree."

Mr. Kerr on Inj., 3d Ed., p. 639,

says: "An injunction which has been granted upon an interlocutory is superceded by the judgment in the action. If it is intended that it should remain in force **it must be expressly continued."**

So in

Vol. 16, A. & Eng. Encyc. Law P. 434,

it is said: "An injunction which has been granted upon an interlocutory order is superceded by the judgment in the action. If it is intended that it shall remain in force, it must be **expressly** continued."

People vs. Randall, 73 N. Y. 416.

This therefore raises the question, can the defendants be held as of contempt of an **order** or **injunction, after** the order or injunction has ceased to be effective? The **adjudication** was July 9th, 1909. The injunction and restraining order on that day ceased by the **final decree.** These proceedings were commenced **thereafter,** and the "order to show cause" (Trans., p. 43) required these defendants to appear in Court and show cause on the 21st day of July, 1909, why an attachment for contempt should not issue. Can defendants be punished **for contempt** for some act done while the order was in **force,** but upon proceedings, **after** the order had ceased to be **effective?** Keep in mind that this Hon. Court, in

Morehouse vs. Pac. H. Co., 177 Fed. 337,

held that this **very** proceeding "is a criminal proceeding to punish by fine or imprisonment those who have been guilty of violating an injunction of the Court."

Being therefore a **criminal** proceeding, certainly the rules and laws applicable to criminal proceedings must prevail.

In Ball vs. Tolman, 135 Cal. 375,

the Court says: "The effect of a repeal of a penal statute

is to **prevent any prosecution, trial** or **judgment** for **any offense committed** against it **while it was in force**, unless there is a saving clause in the repealing act."

To the same effect,

Mahoney vs. State, 63 Am. St. 64;

Pensacola, etc., vs. State, 110 Am. St. 67;

Taylor vs. Strayer, 119 A. St. 469.

These authorities are so clear and concise that it is not necessary to cite others. This being, therefore, as the Court has held, a **criminal** proceeding, certainly when the **orders** were ended, the restraint removed, these defendants could not be **prosecuted** "for any offense committed against them while they were in force." The adjudication ended the orders, there being no **"express** orders continuing them." This, it must be remembered, is **constructive contempt,** not contempt in the **presence** of the Court. The claim is, the **violation** of the orders of the Court duly set out in the affidavit of Mr. Carney. When those orders ceased to be orders, like a penal statute, the violation or offense against them fell with the orders, for the offense, like a penal statute, was **against** the orders. If grave and serious crimes, like **murder,** committed while a law is in force, cannot be prosecuted after the law is repealed, certainly a contempt proceeding cannot be maintained after the injunction and restraining order has ceased. It will not do to say that **contempt** is against the **Court,** for the same reason applies to crimes, as a crime is **against the government.**

In Vol. 7, Am. & Eng. Encyc. Law, p. 28,

Criminal contempt is defined: "Generally it may be said that a criminal contempt embraces all acts committed against the majesty of the law, and the primary purpose of their punishment is the **vindication of public authority."**

Also Vol 7, Am. & Eng. Encyc. Law, 29,

it is said: "If the contempt consists in doing a forbidden

act, injurious to the opposite party, the contempt is considered criminal."

In New Orleans vs. Steamship Co., 20 Wall. 387, the Supreme Court of the United States, speaking through Justice Swayne, said: "Contempt is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment **upon an indictment** for perjury committed in a deposition at the hearing."

In Fisher vs. Hayes, 6 Fed. 63, the Circuit Court of New York said: "It is well settled that contempt of Court is a specific criminal offense, and that the imposition of a fine for contempt is a judgment in a criminal case."

Now, then, this being a **specific criminal** offense, the rule necessarily applies, which applies to all **criminal cases**, and there being no order or proceeding **continuing** the restraining order or injunction upon the entry of the decree of **adjudication**, the decree abrogated the injunction and restraining order, and these defendants could not be subsequently prosecuted, and the judgment of contempt is **void**.

This was the ruling of the Court in

Moat vs. Halken, 2 Edw. Ch. 189,

where the Court said: "No motion, made after the **dissolution** of such an injunction, for an attachment on the ground of an infringement of it **while in force**, can be sustained."

Peck vs. Yorks, 32 How. Pr. 409.

VIII.

But to show how this cause was presented to the lower Court, we here, under this sub-division, print in full our brief, in that Court. We do this for two purposes. One to show that we presented out case fully; and, two, to show that, basing our conduct upon **good faith**, we had authority supporting our position upon which we had the

right to rely as lawyers, and that even though we should be mistaken in judgment, we cannot be held as guilty of contempt because we saw and construed the law differently from the learned judge of the Federal District Court, or as is held in

In re Watts, 190 U. S. 1,

"They could not be found guilty because they believed and declared their belief that the State Court had jurisdiction, and that the District Court had not. Granting that they were misaken, it does not follow that their mistaken conviction constituted contempt. In point of fact the State Court (as here, Trans., pp. 60-61) agreed with them, and would certainly not have entered orders of whose validity it entertained any reasonable doubt."

And further the Court says: "In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interest of his clients, he cannot be held liable for error of judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule." "But it remained for the State Court to transfer the assets, **settle** the accounts of its receiver and **close its connection** with the matter." Thus we see that this decision of the Supreme Court, decided May 18th, 1903, stood as a landmark and guide to the State receiver, the State Court and these plaintiffs in error, and that, although the bankruptcy proceedings may have superceded the State Court, yet the State Court had **the right, before** surrendering and turning over the estate, to **settle** the **accounts** of its receiver, which **account** necessarily **included** the **payment** of his **attorneys,** the rents due, for the building, and such other expenses as his duty commanded him to make. Being the officer of that Court, he had to obey its orders. That Court had the right to "settle his accounts" and "close his connection" with the matter. That Court allowed these

moneys of which complaint is made (Trans., pp. 59, 60 and 61), and upon which this prosecution is based, and such allowance was made upon proceedings taken by these very prosecuting creditors (Trans., p. 59) **after** the bankruptcy proceedings had been commenced. Now the Supreme Court holds that the State Court had this right. Does the exercise of that right make these plaintiffs in error guilty? If this decision of the Supreme Court is law, then these plaintiffs are not guilty. If these plaintiffs fully believed in the decision of the Supreme Court being the law, they acted in good faith. What were they to do? Disobey the orders of the lower Court and be punished there? Have they no rights? Particularly when the Federal Court takes no steps to protect and preserve the property pending an adjudication? When the law grants the corporation the right to deny its insolvency or an act of insolvency, and have the cause tried by a jury, is asserting that right a crime? Or must the corporation, the receiver and these attorneys submit at once, and yield their independence and manhood? Certainly this Court will not hold plaintiffs in error guilty because they differ with the District Court, when many other Courts hold with these attorneys. Since the decision in

Exparte Ward, 190 U. S. 1

the case of In re Zeigler, 189 Fed. 259, has been rendered, upholding our view in that case.

BRIEF OF DEFENDANTS.

a.

We must keep in mind, where was the **possession** of the property of the Exploration Mercantile Company when the **order** was made by this Hon. Court. Was it in the corporation? No, but in the District Court of the State. Being in the District Court of the State, could this Hon. Court **interfere** with that **possession**, simply by an **injunction** or an order to stay issued to persons **not having** the **possession**, and who could not deal with the

property, and who were not **parties** to the bankrupt proceedings?

b.

We must keep in mind that by

Sec. 720, R. S. of U. S.,

no Federal Court, either in an action at law, or a suit in equity, can **enjoin** proceedings in a State Court—here is an absolute prohibition, **except** as to bankruptcy. We must then look to the bankrupt law to find the **grant** of power, to overthrow the **prohibition.** Keep in mind, further, that we are dealing with proceedings **pending** in the State Court, when the bankruptcy proceedings are commenced. This distinction is important, because proceedings in a State Court, **subsequently** to the attaching of jurisdiction in the Federal Court, would be an **interference** with the Federal Court, and could be enjoined—but where the **jurisdiction** was attached in the State Court first—then in **all** cases, other than bankruptcy, the Federal Court **cannot** enjoin by express law.

c.

Look then at the bankrupt law, and

Sec. 11 of that law

says: "A suit founded upon a claim from which a discharge would be a release." Here, then, is the only **grant,** to **stay** proceedings in a State Court. If the suit in the State Court is not upon such a claim, then there is no **grant** of **power** in the bankrupt law, and we are back under the **prohibition** of Sec. 720, R. S. of U. S.

d.

Now, by

Sec. 17, Bankrupt Act,

we find that claims are discharged and released in bankruptcy, and certainly the proceeding in the State Court is not one of those claims.

The law itself, Sec. 1, Bankrupt Act, Sub. Div. 12, defines "Discharge," and says, "Discharge shall mean the

release of a bankrupt from all his debts which are **provable** in bankruptcy." And certainly the suit in the State Court is not upon a "debt" or "claim" **provable** in bankruptcy.

e.

Now, by Sec. 4, Bankrupt Law, a **corporation** cannot become a **voluntary** bankrupt. This is important to be considered, for the reason that when a **voluntary** petition is filed, an adjudication takes place **at once.**

Sec. 18, Bankrupt Law, Sub. Div. "G."

And then, as a matter of course, the Bankrupt Court is at once **vested** with the **estate** of the bankrupt. But in an **involuntary proceeding** the **estate** cannot **vest** in the Bankrupt Court until an **adjudication** for the **involuntary** bankrupt is entitled to his day in Court. He may **deny** his bankruptcy. He is entitled to a trial by jury.

Now by amendment to

Sec. 4, Bankrupt Act of 1903,

there was added these words: "The bankruptcy of a corporation shall not release its officers, directors or stockholders, as such, from any liability under the laws of a State, or Territory, or of the United States."

By Sec. 30, Bankrupt Act,

the rules, forms and orders in bankruptcy are prescribed by the Supreme Court of the U. S., and

Form No. 59,

being the form for the discharge, only **discharges** the bankrupt from all debts and claims made **provable** against his estate. It is apparent then, that the proceeding in the State Court is not **discharged** by reason of bankruptcy.

f.

By Sec. 70, Bankrupt Act, we find the title to the bankrupt's estate vests in the trustee, as of the **date of adjudication.** In a voluntary petition this would be **at once,** but in an **involuntary** petition, not until the hearing, as in this case, not until July 9th, 1909. So that from Sep-

tember 12th, 1908, down to July 9th, 1909, the estate was not **vested** in this Court. The old law was different, making the **vesting** of the **estate,** upon the **filing** of the petition, whether **voluntary** or **involuntary.** But this law makes the **vesting** of the **estate** only upon an **adjudication.** Therefore in an **involuntary** petition, the time between the **filing** of the petition and the **adjudication,** the estate of the bankrupt is **possessed** by the bankrupt, or as in this case in the State Court, and this Hon. Court, has no **possession** or **control** over it for the reason, the estate is not in **custodia legis** until **adjudication.**

To use the language of Mr. Collier,

Collier on Bankruptcy, 6th Ed., p. 588,

"The **filing** of an **involuntary** petition does not **ipso facto** take from the alleged bankrupt his dominion over his property; while his disposition of his property may be invalidated and set aside under certain circumstances, such property remains under his control **until the adjudication.** The **remedy** of the petitioning creditors is by the appointment of a receiver under Sec. 2 (3) (15) or an appropriate proceeding under Sec. 3-2 or Sec. 69."

We thus see that by the bankrupt law, if the creditors wish the **alleged** bankrupt enjoined, they must proceed by

Sec. 69, Bankrupt Act,

as the other sections stated by Mr Collier only relate to the act of the Court in the exercise of the power conferred by the Bankrupt Act, or by

Sec. 3, Sub. Div. e,

in which case a **bond** must be given, as a **condition** precedent to taking **possession** of the **estate. Which was not done in this case.**

It will thus be seen that in **involuntary** proceedings the bankrupt leaves the **estate** of the **alleged** bankrupt free from any **disturbance** from the Bankrupt Court, until **adjudication.** He may carry on his business, buy and sell, pay debts and proceed just as though no petition was

filed against him. Therefore to meet the **probability** that in the meantime the alleged bankrupt might **dispose** of the **estate** or **neglect** it, or that it might deteriorate, the law has **wisely** provided a complete **remedy**, by the creditors giving a bond, to be approved by the Court, a warrant issuing to the Marshal, and a seizure of the estate—then it would be in **custodia legis**, and not till then—**providing**, in this case, it could be taken out of the State Court. When such proceeding has taken place, this Court could of course, in the exercise of its powers as a Court of Equity, issue an injunction or restraining order—but **until** this has been done, the Court has no **jurisdiction** over the estate, and therefore cannot make any **lawful** order in the premises, unless the proceeding in the State Court is upon a claim **provable** and **dischargeable** in bankruptcy.

g.

We must also keep in mind that the **possession** of the **res** being in the State Court, could **not be**, and **was not** in the corporation, the alleged bankrupt, at the time the **order of stay** was made, and that the proceedings herein—that is, the petition originally filed in this Court—the **only** proceeding upon which the **order** in question, together with the affidavit filed at the time, could be made, that Stone, Wylie & Hobbs were not made parties to that proceeding, and were never as individuals served with subpoenas, nor was there any suit pending against **them.** True, as **officers** of the corporation, they were enjoined or could be enjoined by **injunction** process against the corporation—in their **private** capacity as **individuals** there must be some **separate** equitable proceeding, brought against them, because of the **injunction** process of the **Bankrupt** Court—must be something **inhering** in the bankrupt proceeding, independent of its exercise as a Court of Equity. Therefore, **before** Stone, Wylie and Hobbs can be **enjoined** as individuals, they must be made parties by

Sub. Div. 6 of Sec. 2, Bankrupt Act.

They were not made parties. Now, while process of injunction may run against a **party** to a proceeding, his agents, servants and employees, and bind the agents, servants and employees, **although not parties**—the act **against** which they are **enjoined** must be **an act encouraging** or **aiding** the **party** to the **proceeding** to do something **against** the writ of injunction. Now here the **only party** to the proceeding, and the **only** person which could be made a **party** was the corporation defendant.

Mather vs. Coe, 92 Fed. 333,

and the answers of Morehouse, Thompson and Wylie all show that the **corporation**—since the order in question—has never **done anything** either as a corporate body, or by any officer, servant or employee, and could not, because of the proceedings in the State Court. That neither Wylie, Stone, Hobbs, Morehouse or Thompson at any time has represented the corporation, since the **order herein,** in any way, in Court or out of Court (except in this Court), and there is no showing to the contrary in any form.

h.

We must keep in mind that Sec. 69 of the Bankrupt Law applied only to the giving of a bond, and authorizing the Marshal to seize and possess himself of the property of the bankrupt, and does not apply here, and was not pursued, and that Sec. 70 of the Bankrupt Act only applied to the trustee, and of course cannot apply until **after** adjudication, and that Sec. (3-e) makes the giving a bond a pre-requisite to the taking of the property of the alleged bankrupt, and has therefore no application here, as no bond was given—and Sec. 2 (15) is but the general expression of the general power of a Court of Equity, and Sec. (11-a) gives the Court power of a **stay** against proceedings in a State Court. These are all the sections dealing with the **possession** of the estate of the bankrupt, or giving power to the Court to act in the premises. Now

the proceeding was under Sec. (11-a), and none other, because Sec. 2 (15) has only relation to "orders," "process" or "judgments." "necessary for the enforcement of **the provisions of this act.**" These orders, proceeds and judgments are only to be made when some **provision** of the Bankrupt Act is being violated, and must, of course, be made in the bankrupt proceeding, such as compelling obedience to the Marshall or referee, or to make reports and inventories, to turn over property to a receiver, etc., or also, in a general exercise of the powers of a Court of Equity, to grant injunctions, upon special pleadings, ancillary to the bankrupt proceedings for the preservation of property, under its powers prescribed by Sec. 23 (23-a) (23-b) and (23-c).

But while it is true that the filing of a petition in voluntary bankrupt proceedings is a **caveat** to all the word, and at once put the property of the bankrupt in **custodia legis,** in the Bankrupt Court, such is not the case under the **present** law as to **involuntary** proceedings, because now the title and possession of the property remains with the alleged bankrupt until an **adjudication,** and does not pass into **custodia legis** until an adjudication, or unless a bond is given and and a receiver is appointed or a warrant issued to the Marshall.

The property therefore in this case was in the custody of the State Court and did not and could not pass into the custody of this Court, until a decree of adjudication.

Such being the case, there was no property interest, subject to the orders or control of this Court, and the only **proceeding** which could be taken in this case, was to stay proceedings in the State Court.

Suppose a bond had been given under Sec. 69, Bankrupt Act, and a warrant has issued to the Marshall, against whom would the warrant run? Manifestly the corporation, defendant, and it only, because against it, and it only, was the **sole party** to the bankrupt proceeding, and it, and

it only, was prayed against for relief, the prayer being (see petition).

Wherefore, petitioners pray that service of this petition, with subpoena, may be made upon Exploration Mercantile Company, a corporation, as provided in the Acts of Congress, relating to bankruptcy, and that it may be adjudged bankrupt, within the purview of said acts." But the Marshall would find **no property** in the possession of the defendant, or its agents, servants or employees. Could he take the property away from the receiver of the State Court? Most assuredly not. But **after adjudication** the property would **vest** in this Court, and the jurisdiction of the State Court would be supplanted—but not till then. Prior to that time any order of this Court would be unavailing because there would be no jurisdiction in this Court to deal with property over which it had no jurisdiction. The only **power** of this Court, then, must be to **stay** the State Court, and such stay can only be granted by the **express** provision of the law to suits founded on a claim dischargeable in bankruptcy.

i.

But for the acts of these defendants, to be a contempt, they must be in violation of **lawful** orders, because Sec. 2 (13) reads:

"Enforce obedience by bankrupts, officers and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment."

Mr. Collier, 7th Ed., p. 34,

says: "The exercise of the power is discretionary, but cannot be invoked in any case unless the order is a **lawful** one."

j.

In all contempt proceedings, being criminal in character, the party can only be held upon evidence beyond a **reasonable doubt.**

Moody vs. Cole, 148 Fed. 295;

In re Switzer, 140 Fed. 976;
In re Adler, 129 Fed. 502;
In re Goldforks, 131 Fed. 643;
American Trust Co. vs. Wallis, 126 Fed. 466;
Boyd vs. Glucklick, 116 Fed. 140.

k.

And a person is not in contempt, when commanded to do something, not in his power to do, and if the order is in relation to property not in his actual possession and control—he is not guilty of contempt.

Boyd vs. Glucklick, 116 Fed. 140;
In re Goldfork B. W., 131 Fed. 643;
Scheover vs. Brown, 130 Fed. 328;
In re Adler, 129 Fed. 902;
In re Gerstel, 123 Fed. 166;
In re Enos, 164 Fed. 749;
In re Rosser, 101 Fed. 462;
In re Wilson, 116 Fed. 419;
In re Meyer, 98 Fed. 839.

Now, all this time from August 6th, 1908, to adjudication herein, neither of the defendants had the control or possession of any property of the defendant, and this Court had no possession, consfructively or actively, and the whole thereof was in the exclusive possession and control of the State Court.

l.

An attorney who in good faith, but wrongfully, advises a State Court, as to the right of such Court to compel a receiver in bankruptcy to surrender property in controversy **cannot** be **adjudged** guilty of **contempt.**

In re Watts, 190 U. S. 1;
In re Zier, 142 Fed. 102.

m.

The advice of counsel and the orders of the State Court protects the receiver, Wylie.

Orr vs. Tribble, 158 Fed. 897.

n.

The defendants' answers cannot be traversed, but must be taken as true.

In re Purvine, 96 Fed. 192;

Boyd vs. Glucklick, 116 Fed. 141.

We will now discuss and amplify the above propositions and specify the authorities sustaining our contention.

a.

The possession of the property was in the State Court at the time the **stay order** was made. This needs no further elucidation. Wylie, Hobbs, Stone, Morehouse and Thompson were not **parties** to the action of bankruptcy. No relief was prayed against them, or subpoenas issued or served, The relief only prayed was,

"Wherefore, your petitioners pray that service of this petition, with a subpoena, may be made upon Exploration Mercantile Company, a corporation, as provided in the Acts of Congress relating to bankruptcy, and that it may be adjudged bankrupt within the purview of said acts." There is no other prayer or relief demanded. The subpoena ran only against the corporation. Not being parties to the suit, they could not be enjoined.

Alwood vs. State, 54 Pac. 1057;

State vs. Miller, 38 Pac. 269;

Exparte Truman, 57 Pac. 223;

Exparte Widber, 91 Cal. 367;

135 Mo. 230.

And, further. Wylie was a receiver of the State Court, and his possession was the possession of that Court, and he and his attorneys and agents cannot be held for contempt in not obeying an order of some other Court. The question is unanswerably settled by

Atwood vs. State, 54 Pac. 1057,

where it is said, in a case of contempt:

"A second and equally conclusive objection to the sentences of conviction is that the act of the appellants was in law the act of the receiver, and the act of the receiver was in law the act of the Court appointing him. The doctrine of comity between Courts will not permit the subjection of a receiver or his agents, or subordinates acting on his behalf, and in his name, to attachment and conviction for contempt of another Court. If a receiver in the execution of his trust runs counter to the jurisdiction or claim of authority of another Court, the forum to which appeal must be made for the correction of his conduct or the punishment of his offense is the Court appointing and controlling him. This for the reason that a receiver is an arm of the Court, exercising not his own authority, but the authority and power of the Court. These principles have been so often decided that they have become settled law of receiverships."

State vs. Miller, 35 Pac. 269.

The rule is, beyond question, that the Court which **first** acquires jurisdiction and possession of the property cannot be disturbed in that possession by another Court, for, as is said in

Murphy vs. John Hoffman Co., 211 U. S. 562,

"Where a Court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby **withdrawn** from the **jurisdiction** of all other **Courts.** The Court having possession of the property has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property." Also

212 U. S. 118.

There can be no question but the State Court had jurisdiction completely and perfectly, that it took possession of the property, through its receiver, and therefore the property was withdrawn from the jurisdiction of this Court—until the **adjudication.** This Court then had no

authority to make any order effecting the property, until that time, because it had no **jurisdiction** over the property until that time. The possession of the receiver was the possession of the State Court. His acts were those of that Court, and neither the receiver or Hobbs, or Stone, or Morehouse or Thompson did anything outside the receivership or the orders of the State Court. In fact and in law, any **interference** with the receiver would have been a **contempt** of the State Court, for as is said in

Richards vs. People, 81 Ill. 551,

"It is to be remembered that the receiver is the officer of the Court, and that his possession is the possession of the Court, and any unauthorized interference therewith, either by taking forcible possession of the property committed to his charge, or by legal proceedings for that purpose, without the sanction of the Court appointing him, is a direct and immediate contempt of Court, and punishable by attachment."

Therefore Wylie, as receiver, and Morehouse & Thompson, as his attorneys, had to **obey** the **orders** of the State Court. Are they in contempt of this Court for so doing? When this Court has no jurisdiction over the property or business involved until adjudication? Suppose there had been **no** adjudication. Would the orders of this Court be valid? To be **valid** the right and possession of the property must be divested from the State Court. That cannot take place until adjudication. The adjudication vests this Court with possession and control, and divests the State Court. But in the meantime the possession and control of the property and the business is **exclusively** in the State Court, until the **adjudication.** Any order made by this Court **after** adjudication would have to be **obeyed** as against the State Court, but **prior** to that time the **jurisdiction** was in the State Court, and its orders had to be made, for as

Mr. Collier says, 7th Ed., p. 807,

"The filing of an **involuntary** petition does not, **ipso facto**, take from the alleged bankrupt his dominion over his property; while his disposition of his property may be invalidated and set aside under certain circumstances, such property remains under his control until the **adjudication.** The remedy of the petitioning creditors, in case this freedom of trade is abused, is by the appointment of a receiver under Sec. 3-2 or Sec. 69."

We must always keep in mind that the present bankrupt law is not the same as the old laws were—for under **this** law, in involuntary proceedings, there is the **period** between the **filing** of the petition and the **adjudication**—when the estate of the bankrupt is not vested in the Court, and not being in **custodia legis,** the Court has no jurisdiction over it simply by the **filing** of the petition. During that time, if the alleged bankrupt is **actually** in the **possession** of the property, he may do what he pleases with it. If the creditors don't want him to deal or dispose of the property, in the meantime, the bankrupt law has wisely provided them a remedy, to-wit: Sec. 3-e and Sec. 69, both of which compel them to give a bond—because it might happen that he was not in fact bankrupt. The failure to give such bond would make an **order** in the premises void, for the reason that the receiver could not seize property unless there was a bond qualifying him.

In re Haff, 135 Fed. 742.

Now no bond was given in this case. No receiver and the Marshall was not appointed—and so the **estate** was left **outside** of the control of this Court, and, as is said in

In re Oakland Lumber Co., 174 Fed. p. 637,

speaking of the appointment of receiver by the Bankrupt Court:

"What could the Federal receiver do under such circumstances? He has not title to any property. He is a mere custodian. **He could not** take the assets from the

State Court receiver. **The Bankruptcy Court could not make any such order,** and the assets could only be taken from the State Court receiver by an application to the State Court itself."

This is the opinion of the Circuit Court of Appeals of the Second Circuit. If, then, the Bankrupt Court, could not make an order whereby the Marshall or a receiver of such Court could take property out of the possession of the State Court receiver, how can this Court make an order—a lawful order—binding the State Court receiver to obey—or binding his agents and attorneys?

To the same effect are,

In re La Plume Con. Mil. K. Co., 145 Fed. 1013;

American Trust Co. vs. Willis, 126 Fed. 465.

The reason is that the possession of the estate is in the bankrupt and not in the Court, between the filing of the petition and the adjudication, and can only be dealt with by the appointment of a receiver, when in the bankrupt's possession—but when the estate is not in his possession, but that of the State Court, through its receiver, then the Bankrupt Court cannot make **any** order—**valid order**—concerning the estate. Before a **lawful** order can be made one of two things must exist. 1st, the proceedings in the State Court must be upon a claim dischargeable in bankruptcy; or, 2nd, the order must be made **after** adjudicating bankruptcy. If the suit in the State Court **is not** upon a claim dischargeable in bankruptcy, then such action is not effected by the bankrupt law, so far as an injunction or restraining order is concerned, and until an adjudication, the estate of the bankrupt does not pass into the custody of the Bankrupt Court. There is therefore no jurisdiction in the Bankrupt Court to make **any** order. But when adjudication takes place, at **once** the **property** of the bankrupt, independent of the suit in the State Court, vests in the Bankrupt Court. Then, and not till then, does jurisdiction attach, and it attaches to the

estate—but if the **estate** is then not in possession of the bankrupt—the **ownership** of the property would be in the Bankrupt Court, but the possession would not be only the right to the possession—and that right to possession would be **against** the State Court, whose duty it would be to at once, upon proper demand, surrender it to the **trustee** in bankruptcy.

Now up to this time there is no law that we can find giving the Bankrupt Court **power** to make any order, under the circumstances of this case against the receiver or his agents or the State Court or touching or effecting the estate of the bankrupt. Such an order is void and beyond the power of the Bankrupt Court.

b

Sec. 720, R. S. of U. S., prohibits beyond question an injunction ordinarily against the State Court. The only **exception** is in bankruptcy. Now, what is that **exception?** There is none other but Sec. 11-a of the Bankruptcy Act. In fact, the petition for the **stay order** and **injunction** is based **solely** upon the proceedings in the State Court and the order of this Court in the injunction is, **"from further prosecuting said suit in said Court, and from taking any further steps or proceedings in said action or suit now pending as aforesaid."** This is the only **order** made by the Court, by way of **injunction;** that is, this was the **writ of injunction.** Also, the Court made **personally** a **stay order,** running against the Exploration Mercantile Company and C. E. Wylie, receiver. Now, notice the **stay order** of this Court reads, **"The said parties against whom the injunction is prayed, be restrained."** The Court's personal order does not **name** the parties, except as above, and therefore we must look to the **petition** for the order to find who the parties are, and the **prayer** of the petition is,

"The premises considered, they pray for an order enjoining and restraining the said Exploration Mercantile Company, a corporation, and C. E. Wylie, receiver as aforesaid."

It will thus be seen that the **stay order** runs only against the corporation, and C. E. Wylie, as **receiver,** of the State Court, "from the sale of, or in any other manner disposing of the property or estate or any part thereof" of the corporation.

While the **injunction** runs **against** W. C. Stone, C. E. Wylie and Exploration Mercantile Company, "from further prosecuting the suit, etc."

In the **stay order Wylie** is stayed, as an **officer** of the State Court, and in the injunction as a **private** individual.

In the **stay order,** Stone and Hobbs are not **included at all.** In the injunction Hobbs is not included, but Stone is, as an **individual.**

Now there **is no evidence** before the Court that Stone ever did anything in the way of **prosecuting** the suit, or that any **steps** were taken by him, or **through** him in that behalf. As to the restraining order, he is **not** included. He therefore has not **violated** either of the orders, as a party thereto, and he can only be held, if at all, as **advising Wylie,** as an **officer** of the State Court.

Hobbs is not in either order, and therefore cannot be held as a **party, enjoined or restrained,** and if held at all, must be **held** as **advising** and **aiding Wylie,** as an **officer** of the State Court.

Thompson and Morehouse are not in either order, and they can only be held, if at all, as **advising** and **aiding** Wylie, as the officer of the State Court.

The only **acts** are those of **Wylie,** as the **officer** of the State Court, so far as the **facts** are proven. Everything he did was under the **orders** and **directions** of the State Court, and in his **capacity** as receiver. All moneys **received** or **paid out** were moneys **received** and **paid** as receiver of the State Court. The **corporation** has done **nothing,** and no **officer of** the corporation has **acted** in any **manner** whatever. No **sales** have been made, but moneys have been

collected and paid out—but only **collected** by the **receiver** of the State Court, as **receiver,** and **paid out** as receiver.

Therefore, we are met with two questions. 1st. Can this Court make a **lawful** order staying proceedings in **this** case, against the State Court? 2nd. Can this Court make a **lawful** order **restraining** and **enjoining** the **receiver** of the State Court? If it **cannot** there is no **contempt.** It it can, the petitioners for the **contempt** proceedings should show **affirmatively** the power and authority for this Court to make such orders.

Now, by Sec. 720, R. S. of U. S., this Court, as an **equity** Court, has no such authority, but is **absolutely** prohibited from so doing. Its power, if any, must be **found specially** conferred by the bankrupt law. Where is that **authority?** Not in Sec. 2 (3) or Sec. 69, because that **course** and **proceedings** was not adopted; not in Sec. 2 (15), because that only refers to the **equity** powers of the Court, or, as is said by

Mr. Collier, 7th Ed., p. 29,

"This is in recognition of the equity powers of the Court and authorizes intervention by the Court, through receivership or otherwise, to preserve the property of the alleged bankrupt;" that is to say, when the Court **has acted** under Sec. 2 (3) or Sec. 69, it may make such orders, issue such process, etc., and can only be exercised upon petition and bond.

Collier, 7th Ed., p. 90.

It will be seen that Sec. 2 (15) means the exercise of the power of the Court in carrying out something done under the provisions of this act, as for instance **after** the appointment of a receiver under Sec. 2 (3), to make such orders, issue such process, etc., as will enable the receiver so appointed to carry out his duties, under the "provisions of the act," and has no reference to **original** orders, but orders made to aid and assist the various officers performing their duties under the act; but if sought for as an

original proceeding, must be iniatiated by proper pleadings and subpoena, on the equity side of the Court, which was not done in this case. But our contention as to the power of this Court to make the **order** in question under Sec. 2 (15), or at all, under the circumstances is squarely sustained and positively passed upon in

In re Ward, 104 Fed. 985.

And as we understand the law, and the judicial decision of the Supreme Court of the United States, this case of **In re Ward, Supra,** is unanswerable. Certainly,

Bardes vs. First Nat. Bank, 178 U. S. 524;

Pickens vs. Roy et al., 187 U. S. 177;

Louisville T. Co. vs. Conninger, 184 U. S. 18.

The reasoning in In re Ward, **supra,** is fully borne out in Louisville Trust Co. vs. Coninger, **supra,** and therefore as all the property of the corporation was in the hands of the State Court, and not in the **possession** of the defendant, this Court would not have jurisdiction to make the order. Besides this last case, 184 U. S., **supra,** holds as does

Mather et al. vs. Coe, 92 Fed. 233,

that, "it would be inadmissable to permit creditors to deprive an assignee of his right to have his claims adjudicated by the proper Court and in the customary mode of proceeding, by the **device** of making him a party to the petition for adjudication and so attempting to bring him into the case for all purposes," and says further, "We think it could not have been the intention of Congress thus to deprive parties claiming property of which they were in possession of the usual processes of the law in defense of their rights." This is the language of the Supreme Court of the United States, and the Court in Mather vs. Coe., **supra,** says: "Hence the special prayer of this petition that W. A. Creech, the **receiver** appointed in the State Court, be enjoined from disposing of the property in his ds, is wholly inadmissable and foreign to the proceedings."

Why, because the **summary** or **plenary** power of this Court cannot be used to deprive the State Court receiver of his day in Court, by regular suit, for as is said in the last case cited, "If **before** the trustee can be appointed, it be **necessary** for the petitioning creditors to take steps to save the property **pendente lite,** and which the contest over the adjudication is pending, that **must be done** by special proceeding in a Court of competent jurisdiction, whether this Court or some other Court, wherein the **adverse holders** are made parties defendant, and given a day in Court to be heard against the proposed seizure. The **Fourteenth Amendment** of the Constitution requires this, as otherwise the seizure could not be "due process of law."

Now certainly if the property cannot be seized by a summary process, and the **receiver** cannot be made a party to the bankrupt proceeding, and a suit must be instituted to give him his day in Court, and his right to defend, and his right to trial by jury, as these authorities hold, it must be true as held in In re Ward, 104 Fed. 985, that a **restraining order** and **injunction** cannot issue against him. This seems plain, logical and unanswerable, and therefore we say that the Court could not make this order, and the same is **unlawful** and beyond the jurisdiction of the Court, unless the Court can make the same under Sec. 11-a, Bankrupt Act.

That section says: "The proceeding in the State Court was not on a claim, debt or demand, dischargeable in bankruptcy (Trans., pp. 30 to 33). The plaintiffs in the State Court had nothing—alleges nothing—sets forth no fact on which he could file any claim, or even participate in any way in the bankruptcy proceeding. And here, the receiver in the State Court, and the plaintiff in the State Court, were not parties to the bankrupt proceedings. That proceeding was wholly against the corporation defendant. The corporation has done nothing under or against the order of injunction.

Power of Bankrupt Court to enjoin or stay proceedings in State Court is fixed by

Section 11, Bankrupt Act.

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him."

Notice the word "claim." The law only refers to a claim; that is, a suit or proceeding by a creditor upon a claim provable and dischargeable in bankruptcy.

Notice the word "discharge." Now, "discharge" has a definite and clear meaning in bankruptcy, for Section 17, Bankrupt Act, reads:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts."

Therefore, the bankrupt act only authorizes a stay or injunction against suits founded upon claims by creditors, which claims are provable in bankruptcy, and are discharged by the debtor's release. If the suit is not upon a claim of a creditor, nor upon a provable debt, then the Bankrupt Court is not authorized by the bankrupt law to stay the suit.

Again, notice the word "debts." The law reads, "from all provable debts." If the suit is not based upon a "debt" it can not be discharged in bankruptcy because not within the purview of the bankrupt law.

Or, as is said in

In re Siebold, 105 Fed. 910, at p. 914,

"There is no provision in the present bankrupt law which authorizes or permits the courts in bankruptcy, by the use of summary or plenary process, to stop the proceedings of a State Court in a suit in which it had already, before the institution of the proceedings in bankruptcy, obtained possession of the subject matter and jurisdiction of the parties."

In Tennessee Pr. M. Co. vs. Grant, 135 Fed. 322, sustains our contention fully, that under the circum-

stances of this case the District Court of the United States had no authority or power to issue the injunction herein.

And Mr. Collier says,

Collier on Bankruptcy, p. 142 6th Ed.:

"Cannot be granted against suits founded on provable debts that are not dischargeable."

And on page 143 he says:

"As dependent on dischargeability of debt—this is the very basis of jurisdiction. The suit must be founded upon a claim from which a discharge would be a release."

He also says, on pp. 145 and 146:

"Where a proceeding was commenced long prior to the proceedings in bankruptcy, and the property in controversy was under the control and in the possession of a receiver appointed by the State Court, a bankruptcy court can not enjoin the proceedings."

This is our case. The suit in the State Court was one month and six days before the bankrupt proceedings. The suit was not a claim provable or dischargeable in bankruptcy. The State Court had perfect and complete jurisdiction, both of the subject matter of the action and the person of the defendant. It had full and complete possession of the property through its receiver. Therefore,

Section 720, R. S. of U. S.,

reads: "The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a state, except in cases where such injunction may be authorized by any law relating to proceedings by bankruptcy."

Now, where is there any authority in the Bankrupt Act? None. The state has jurisdiction. It attached before proceedings in bankruptcy.

So, in Eyster vs. Goff, 91 U. S. 521,

the Court says: "It is a mistake to suppose that the Bankrupt Law avoids, of its own force, all judicial proceedings

in the State or other Courts the instant one of the parties is adjudged a bankrupt. There is nothing in the Act which sanctions such a proposition." "The opinion seems to have been quite prevalent in many quarters at one time, that the moment a man is declared a bankrupt the District Court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other Court. This Court has steadily set its face against this view."

Neither of these cases have ever been reversed or modified, and stand today as the decision of the highest judicial tribunal of the nation.

Further, the statute uses as hereinbefore stated (Sec. 11, Bankrupt Act) "which a discharge would be a release." Now, the Bankrupt Act, Sec. 17, says: "A discharge in bankruptcy shall release a bankrupt from all his provable debts." It must be plain, therefore, that this is not a suit that can be stayed at all.

Under the old law a suit against a corporation could not be stayed.

Meyer vs. Aurora Ins. Co., 7 B. R. 191.

Now, Mr. Collier, in his 7th Ed. on Bankruptcy, page 209, says:

"The section under consideration provides for the stay of a suit which is founded upon a claim from which a discharge would be a release. This dischargeability of the debt is made the basis of jurisdiction. There can be no stay under this section unless the suit is founded upon a claim which a discharge would be a release."

From these authorities and the Bankrupt Act, it is apparent that the District Court had no jurisdiction to issue the stay and injunction herein, because the suit in the State Court was not upon a claim dischargeable or provable in bankruptcy." And the following authorities are exactly to the point:

In re Seehold, 105 Fed. 910;
In re N. Y. Tunnel Co., 159 Fed. 588;
In re Bay City, etc., 135 Fed. 850;
In re Haff, 135 Fed. 742;
Vol. XVI Am. & Eng. Cyc. L., p. 417.

And no one will claim the suit was upon a claim **provable** or **dischargeable** in bankruptcy. The order, therefore, staying proceedings and the injunction are not **lawful**, and the parties cannot be held in contempt. The jurisdiction being wanting to make the order at the **time** it was made, the same is void, and there can be no contempt.

124 U. S. 200;
123 U. S. 443;
113 U. S. 713;
104 U. S. 604;
212 U. S. 118.

And the Court must have jurisdiction to make the particular order.

13 U. S. 713.

And as to the jurisdiction of the State Court in the premises one need only read

212 U. S. 118.

We need not cite authorities to show the elementary proposition that a **receiver** is the Court itself—and that the only acts done were those of the receiver acting officially, and not in his individual capacity. Therefore as all acts were done by the **receiver** as receiver, and all **advice** by Thompson and Morehouse were in aid of the receivership and under orders of the State Court, and in good faith, and all moneys received and paid out were received by the receiver as receiver, and paid out as receiver, and nothing done **wilfully**, we submit the defendants should be discharged from the order to show cause.

Keep in mind, our contention is, that no order can be made for injunction, or stay, under the facts in this case.

until **adjudication**—because up to that time the **estate** is in the State Court. After **that,** the property would pass to this Court, but before that **time,** this Court has **no jurisdiction** over the property, the proceeding being involuntary, and the **possession** of the estate not being in the corporation defendant. We respectfully submit the order to show cause herein should be discharged.

GEORGE S. GREEN,
Attorney for Defendants.

I. S. THOMPSON and H. V. MOREHOUSE,
In Propria Persona.

o.

But could the Court, in an **involuntary** petition in bankruptcy, where the receiver of the State Court is not a party, and where he cannot be made a party, issue an injunction and stay order before an **adjudication** takes place? We deny that the Court can do so. (This point is Assignment VIII of Errors.)

Do we stand alone in this contention? No. Because in

In re Bay City Irrigation Co., 135 Fed. 850;
Mather vs. Coe, 92 Fed. 333;
In re Wells, 114 Fed. 222;
In re Ward, 104 Fed. 985;
Smith vs. Belford, 106 Fed. 658;
Tenn. Prod. Mark. Co. vs. Grant, 135 Fed. 322.

Again,

In re Subold, 105 Fed. 910.

What is the meaning of Sub. Div. "e" of Sec. 3 of the Bankrupt Act, which reads, "And an application is made to take charge of and hold the property of an alleged bankrupt, or any part of the same, **prior to the adjudication** and **pending** a **hearing** on the petition, the petitioner or applicant shall file in the same Court a bond with at least two sufficient sureties, etc.?" Can the petitioners avoid this plain law by doing the same thing by an **injunc-**

tion, and thus **take charge** of and hold the property so that the receiver of the State Court and the State Court cannot act in the premises? We do not claim that Sub. Div. "e" of Sec. 3, Bankrupt Act, applies only in the sense that the **intent** of Congress is there, in connection with Sec. 11, Bankrupt Act, and that title does **not vest** in the trustee **until adjudication**, to the purpose that in cases of **involuntary** bankruptcy the possession of the bankrupt's estate **does not** vest in the Bankrupt Court until **adjudication**. That in the meantime, where proceedings have taken place in the State Court, **before** proceedings in bankruptcy, such possession and right to possession cannot be interfered with by the Bankrupt Court, by injunction, because of Section 720 R. S. of U. S.—because the right to injunction must be specially provided for by the Bankrupt Act, and to make the use of an **injunction** a matter within bankruptcy—then steps must be taken to take the possession of the estate into the custody of the Bankrupt Court. When such steps are taken, and the debtor or the receiver of the State Court is **protected** by bond, the Federal Court issues its injunction. For that reason Congress has provided the mode by which in **involuntary** proceedings the possession and right to possession of the estate may vest in the Bankrupt Court. Until that is done, the mere **jurisdiction** of the bankrupt proceedings does **not vest** the property in the Bankrupt Court. The difference between **voluntary** and **involuntary** proceedings is manifest. In the voluntary proceedings, the debtor transfers ownership, possession and right to possession, **at once** into the Bankrupt Court. It is his act and deed. In the involuntary proceeding nothing is transferred. No title, possession or right to possession passes to the Bankrupt Court, and may never do so. It all depends upon an **adjudication**. In the meantime the possession of a state receiver is valid, lawful and proper. This Congress knew, and therefore has provided different from the old law, that the **title** in the trustee should **relate** back not to the **filing** of the **petition**,

but to the **date** of adjudication. In the voluntary proceeding title passes by the act of the party, but in the involuntary proceeding by operation of law. The one dates from the filing of the petition and the other from adjudication. Knowing this, and intending this, Congress has fully provided that creditors may in the meantime **protect themselves** by giving bond, and taking over the estate, and having a receiver appointed. If they do not do so, then the Bankrupt Court, **as a** Bankrupt Court, cannot enjoin, except where the action in the State Court is upon a claim dischargeable in bankruptcy, and where the claim is not **dischargeable** in bankruptcy, as here, Sec. 720, R. S. of U. S., applies **absolutely,** unless a bond is given, a receiver appointed, and the modes provided by the bankrupt law are carried out. Therefore, the stay order and injunction were beyond the power and jurisdiction of the Court to make and are void.

This is not merely our statement of the law, but

In re Wells, 114 Fed. 222,

Where that Court says, "The Act of 1867 carried with it many evils, real or supposed. One of the evils was its oppressive and expensive features. The estate was eaten up by a most vicious fee system. The litigation was all or practically all in the Federal Courts, generally sitting at a great distance from the debtor, the claimants and the witnesses. **It was the purpose** of the present statute to correct this, and limit the fees and expenses, and have the greater part of the litigation where the parties resided. Under the former statute, the title to all property passed upon the mere filing of the petition. The judiciary committee of the House, in reporting the bill, which became the present statute, **called attention** to this evil, and said that it was corrected by passing the **title** as of the **date** of **adjudication.** And such is the language of the statute. And if this is not so, see what we have: A petition is filed. The debtor can, and often does, **deny** the commission of

the alleged act of bankruptcy. He can demand a trial by jury, and perhaps never be adjudged a bankrupt. This takes months. The petitioning creditors can obtain an injunction and keep the property intact. But in this case the credtors keep quiet and avoid such **expense** and liability. Now, in the meantime, can it be possible that nothing can be done by the debtor or by any other Court? The writ of injunction is denied."

Here we have the plain judicial decision of a Federal Court, fully sustaining our contention, and not only that, but showing the very purpose and **intent** of Congress in making the **title** and **possession,** in **involuntary** proceedings, to **vest** in the Bankrupt Court, only upon **adjudication.** Therefore, the right to an **injunction** and **stay order** can only exist in the Bankrupt Court, in an **involuntary** proceeding, 1st. When the proceeding in the State Court is upon a **claim dischargeable** in bankruptcy, and 2nd. When the petitioning creditors give **due and proper bond,** as a means of protection, and take thereby the estate into the custody of the Federal Court. No bond having been given, and the action of the State Court, not being upon a claim dischargeable in bankruptcy, the injunction and stay order are void and beyond the power of the Court to issue. This seems so clear to us that we cannot imagine how anyone, who will fairly interpret the Bankrupt Act, and free his mind from the glamor of jurisdiction supposed to exist, right or wrong from the law of bankruptcy, and who realizes that the judicial decision under the Act of 1867 is not in this case applicable under the law of 1898, and that the **legal expression** found in the law books and judicial decision, that "the filing of the petition is a caveat to all the world," and in effect an injunction and attachment, is **not true** as to **involuntary** bankruptcy, under the present law, and if found in a case where the proceeding was involuntary, was used mistakenly by the Court, the Court not having in mind the distinction

between voluntary and involuntary bankruptcy, or because the point was not at issue.

Thus we acted. Thus we believed. Thus, when the creditors were not willing, as said by Judge McPherson in **In re Wells, supra,** "But in this case the creditors kept quiet and avoided expense and liability," that these creditors forced upon the State Court and the state receiver to bear the burden of caring for the estate to protect the estate for them, to pay or fight in Court the payment of rents, to employ counsel, take their advice, and yet to be expected that he could not and should not pay such expenses, was to us, and still is to us, beyond belief, that our acts should be inflicted with punishment, when the control, custody and possession of the property had not yet passed into the Federal Court, and could not until **adjudication.** And at the same time the State Court could and did make orders that had to be obeyed, and if not obeyed, then the receiver and these plaintiffs, as his attorneys, were subject to being punished for contempt, and they stood as Judge Greer said in

Peck vs. Jenness, 7 How. (U. S.) 624:

"For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to process for contempt in one if they dared proceed in the other."

Thus we stood. Thus we were situated, and we had before us these decisions, and believed that when the Supreme Court of the United States said in

In re Watts, 190 U. S. 1,

"But it remained for the State Court to transfer the assets, **settle the accounts** of its receiver and **close its connection** with the matter."

If this be the law, and the highest Court of the Nation so says, then these payments were payments which the State Court had the right to allow the state receiver, before turning over the estate, and belonged to that Court, to

settle and pay, and the injunction and stay, under this ruling of the Supreme Court, could not extend to those things which the State Court had the **right** to do, even though enjoined, and even though the bankrupt proceeding "operated to suspend the further administration of the insolvent's estate in the State Court." Such being the case, and thus believing, and thus actuated by perfect good faith and with no wilful purpose, how we can be held guilty of contempt we leave to this Hon. Court, feeling that if the independence of counsel, acting in behalf of clients, and backed by judicial decision sustaining their course, is contempt of Court, then attorneys better know that they have **no** rights, and that they must in all things yield to the opinion of the Judge on the bench, and that any difference of opinion with the Court becomes contempt. We do not believe such is the law or that we should be held guilty, and respectfully submit to this Hon. Court our cause, in the full belief that we shall be found not guilty. We do not think that His Hon. Judge Farrington had any feeling of unkindliness in this matter, but that he has acted from a conscientious conviction of what he believed to be his duty.

Respectfully submitted,

H. V. Morehouse and I. S. Thompson

In Propria Persona.

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No. 2145.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

H. V. MOREHOUSE and I. S. THOMPSON,

Plaintiffs in Error,

vs.

THE GIANT POWDER COMPANY, CONSOLIDATED, a Corporation; PACIFIC HARDWARE AND STEEL COMPANY, a Corporation, and J. A. FOLGER AND COMPANY, a Corporation,

Defendants in Error.

In the Matter of EXPLORATION MERCANTILE COMPANY, a Corporation,

Bankrupt.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

W. C. Stone, C. E. Wylie and Frank G. Hobbs were all of the stockholders and directors of the Exploration Mercantile Company, a corporation. They all knew that the corporation was insolvent and agreed

upon a plan to apply to the State Court for a receiver, who should be one of their own number, whereby they proposed to tie the hands of the creditors and themselves control the business and conceal the actual condition. They mutilated the books, allowed themselves fabulous salaries, and in every possible way sought to hinder, delay and defraud the creditors. (Trans., pp. 116, 121-123, 150.)

After the filing of the petition in the Bankruptcy Court, and the issuing and serving of the injunctions, they knowingly, wilfully and contemptuously disobeyed the orders of the Court. (Trans., pp. 91, 92.)

Their attorneys, Morehouse and Thompson, with full notice and knowledge, did wilfully and contemptously advise, induce, aid and abet them in these acts. (Trans., pp. 93, 94.) Wylie, Stone, Morehouse and Thompson were acting together as allies and confederates. (Trans., p. 157.)

Morehouse and Thompson, the plaintiffs in error, appropriated $1000.00, ostensibly as attorneys' fees, in defiance of the order of the Court (Trans., p. 149), and still retain the money. (Trans., p. 151.)

The matter of the alleged petition of W. P. Fuller & Co., mentioned on page 4 of the brief of plaintiffs in error, is but a part of the evidence which cannot be reviewed on writ of error. That petition was also a step taken by plaintiffs in error in furtherance of the scheme to hinder, delay and defraud creditors, and the determination of the trial Court is final.

The further facts appear in the argument.

Plaintiffs in error do not question any ruling as to the admission or rejection of evidence. None of the

evidence is imported into the record. It follows, therefore, that if the pleadings and the judgment are sufficient the action of the lower Court must be affirmed.

> "A writ of error addresses itself to any defect apparent on the face of the record provided the defect be pointed out in the assignment of errors, but the evidence taken in a cause is no part of the record unless, by some method known to the law, it be imported into the record. . . . Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdiction according to the course of the common law."

In re Grove, 180 Fed. 62, 64;
Continental Gin Co. vs. *Murray,* 162 Fed. 873;
Fairfield vs. *U. S.,* 146 Fed. 508.

For convenience the paragraphs of this brief will be numbered to correspond with the numbers of the assignment of errors.

I.

The first assignment of error is that the present District Court of the United States, in and for the District of Nevada, is without jurisdiction because, it is claimed, The Judicial Code abolished the court in which this cause was heard.

But that court was not abolished, nor has it at any time since the beginning of the proceedings in the matter of the Exploration Mercantile Company been deprived of any of its functions or ceased to exist.

"Sec. 294. The provisions of the Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest."

The Judicial Code, Sec. 294; U. S. Stats. at Large, 1909-1911, vol. 36, part 1, p. 1167.

"Sec. 299. The repeal of existing laws, or the amendments thereof, embraced in this Act, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding, including those pending on writ of error, appeal, certificate, or writ of certiorari, in any appellate court referred to or included within, the provisions of this Act, pending at the time of the taking effect of this Act, but all suits and proceedings, and suits and proceedings for causes arising or acts done prior to such date, may be commenced and prosecuted within the same time, and with the same effect, as if said repeal or amendments had not been made."

The Judicial Code, Sec. 299, U. S. Stats. at Large, 1909-1911, vol. 36, part 1, p. 1169.

By The Judicial Code the Circuit Court was abolished and the jurisdiction of that court was transferred to the District Court. The latter tribunal lost none of its powers, but, on the contrary, had jurisdiction of further matters conferred upon it.

The Judicial Code, Secs. 289, 24.

II.

The second alleged error is that the proceedings herein are for criminal contempt, that, therefore, the Court had no jurisdiction to award the fines assessed against the plaintiffs in error as remedial compensation for expenses, costs and attorney's fees for the prosecution of these proceedings; and that, no prayer for relief being incorporated in the motion or affidavit by which the proceedings were called to the attention of the Court, the trial Court had no power to grant such relief.

1. The Bankruptcy Act itself gives full jurisdiction to do all that the District Court of the United States has done in this case.

The filing of the petition in bankruptcy was "a *caveat* to all the world, and, in effect, an attachment and an injunction."

> *Mueller* vs. *Nugent,* 184 U. S. 1, 14;
> *Staunton* vs. *Wooden,* 179 Fed. 61, 62;
> *New York Mfg. Co.* vs. *Cassel,* 201 U. S. 344;
> *Clay* vs. *Waters,* 178 Fed. 385, 394.

It is a criminal offense for any person to receive "any " material amount of property from a bankrupt after " the filing of the petition, with intent to defeat this " Act."

> Bankruptcy Act of 1898, Sec. 29, b, (4).

And the procedure followed in the Bankruptcy Court in this cause is fully warranted.

> Bankruptcy Act of 1898, Sec. 2, (4), (13), (15) and last clause of (19);

In re Swofford Bros. Dry Goods Co., 25 Bankr. Rep. 282, 286, 180 Fed. 549;
In re Hornstein, 122 Fed. 266.

The discussion of the learned trial judge on pages 137 to 148, inclusive, of the Transcript, is worthy of particular attention on this branch of the subject.

2. The distinction between civil and criminal contempts may be important because of the difference in procedure. In a case of criminal contempt review can be had by writ of error only, while appeal is the only method allowed in cases of civil contempt. And if the wrong method is pursued the writ of error or appeal, as the case may be, will be dismissed.

Merchants' Stock & Grain Co. vs. *Board of Trade,* 187 Fed. 398;
Bessette vs. *Conkey Co.,* 194 U. S. 324, 24 Sup. Ct. Rep. 665, 48 Law Ed. 997;
Matter of Christensen Engineering Co., 194 U. S. 458, 24 Sup. Ct. Rep. 729, 48 Law Ed. 1072;
Doyle vs. *London etc.,* 204 U. S. 599, 27 Sup. Ct. Rep. 313, 51 Law Ed. 641;
Ex parte Heller, 214 U. S. 501, 29 Sup. Ct. Rep. 698, 53 Law Ed. 1060;
Webster Coal Co. vs. *Cassatt,* 207 U. S. 181, 28 Sup. Ct. Rep. 108, 52 Law Ed. 160;
Clay vs. *Waters,* 101 C. C. A. 645, 178 Fed. 385.

3. The distinction between civil and criminal contempt may also be important as a matter of substance where, on a hearing for civil contempt, a person is compelled to testify against himself. He cannot then, in

violation of his constitutional right not to be compelled in any criminal case to be a witness against himself, be punished for a criminal contempt.

> *Gompers* vs. *Buck Stove & Range Co.,* 221 U. S. 418, 31 Sup. Ct. Rep. 492, 55 Law Ed. 797;
> *Kreplik* vs. *Couch Patents Co.,* 190 Fed. 565.

4. Where the case is tried as a criminal contempt, and so understood by the parties, and the defendant is ordered imprisoned for ten days, the dominant element is criminal and the sentence is proper. It is also proper to order the defendant, in the same proceeding, to pay a fine of $500.00 for the use of the petitioners.

> *Kreplik* vs. *Couch Patents Co.,* 190 Fed. 565.

And to the same effect see:

> *Continental Gin Co.* vs. *Murray Co.,* 162 Fed. 873.

5. Where the case is tried as a civil contempt, that is, where the remedial element dominates, it is also proper to impose punitive penalty by imprisonment or fine payable to the government, as an incident.

> *Merchants' Stock & Grain Co.* vs. *Board of Trade,* 187 Fed. 398.

The United States Courts have regularly given both remedial and punitive relief for contempt in one and the same proceeding.

> *Sabin* vs. *Fogarty,* 70 Fed. 482, 485;
> *In re North Bloomfield Gravel Mining Co.,* 27 Fed. 795;

In re Wilk, 155 Fed. 943;
Cary Manfg. Co. vs. *Acme Flexible Clasp Co.,* 108 Fed. 873, and cases cited.

6. A person charged with contempt is not entitled to a jury trial, and, therefore, the rules regarding indictments are not applicable. The proceeding is summary in character and no particular form of pleadings is required. It is sufficient that by petition, affidavit, motion, or other showing it is made to appear that there has been a wilful violation of the Court's order.

Aaron vs. *United States,* 155 Fed. 833;
In re Fellerman, 149 Fed. 244;
Kreplik vs. *Couch Patents Co.,* 190 Fed. 565;
Hammond Lumber Co. vs. *Union,* 149 Fed. 577;
Employers' Teaming Co. vs. *Teamsters' Joint Council,* 141 Fed. 679.

7. Formal defects in the moving papers in contempt are cured and waived by failure to make objection to their sufficiency and answering on the merits.

Aaron vs. *United States,* 155 Fed. 833;
9 Cyc. 39.

Many of these principles are set forth so clearly in two recent decisions of the Circuit Court of Appeals that it will be well to examine the language of the decisions more fully:

"Let us look at the precise action which is brought before us. The final decree shows that the Circuit Court did three distinct things: First, the court found that the defendant, Samuel Krep-

lik, did violate the injunction of the court; second, the court ordered Samuel Kreplik to pay a fine of $500 to the clerk of the court for the use of the petitioner within 10 days from the date of the decree; third, the court ordered Samuel Kreplik to be imprisoned for 10 days. The court further provided for necessary process to enforce its order.

"It appears, then, that the Circuit Court, provided compensation to the petitioner for the losses it had suffered by reason of Kreplik's act of contempt. This court is not called upon to pass upon the question whether or not the compensation so awarded is excessive. Questions as to the amount of compensation to the petitioner are not properly raised. While the defendant assigned as error that the Circuit Court imposed a fine in the absence of evidence showing the expenses incurred by the petitioner, he did not rely upon such assignment in his exceptions. Thus the question of the reasonableness of compensation is not before us. In *Merchants' Stock & Grain Co.* vs. *Chicago Board of Trade,* 187 Fed. 398, 109 C. C. A. 230, the Circuit Court of the Eighth Circuit has recently considered the question in relation to what matters may be passed upon under a writ of error, and what questions may be reviewed only by appeal.

"The courts of the United States recognize that the process of contempt has two distinct aspects—one criminal, to punish disobedience; and the other remedial and civil to enforce a decree of the court, and to compensate private persons. In *In re Christensen Engineering Co.,* 194 U. S. 458, 24 Sup. Ct. Rep. 729, 48 Law Ed. 1072, it was held by the Supreme Court that, where the fine

for violation of an injunction is to reimburse the party injured by the disobedience, it has not a punitive character; but, where the fine is payable to the United States, it is clearly punitive and in vindication of the authority of the court. *Bessette* vs. *Conkey,* 194 U. S. 324, 24 Sup. Ct. Rep. 665, 48 Law Ed. 997. In *Gompers* vs. *Buck Stove & Range Co.,* 221 U. S. 418, 31 Sup. Ct. Rep. 492, 55 Law Ed. 797, the Supreme Court has lately passed upon this question. The court clearly draws the vital distinction between proceedings for civil contempt, which are between the original parties, and proceedings at law for criminal contempt, which are between the public and the defendant. The court holds that the proper remedial relief for a disobedience of an injunction in the equity cause before it would have been to have imposed a fine for the use of the complainant, measured in some degree by the pecuniary injury caused by the act of disobedience.

. . . .

"We have no doubt that the action of the Circuit Court in giving its remedial relief was free from error. The action of the Circuit Court in giving compensation to the petitioner was in our opinion lawful in accordance with the practice of the court in this circuit, and with the rule of the Supreme Court.

"Did the Circuit Court err in ordering the defendant to be imprisoned for 10 days?

"In the Gompers Case the Supreme Court has exhaustively considered the whole subject of contempt. The court there points out that contempts are neither wholly civil nor altogether criminal; and that it is not always easy to classify a particu-

lar act as belonging to either of these two classes. The court there had to determine whether the case before it was one of criminal contempt; and it was compelled to give a critical examination to the pleadings, the procedure, the attitude of the parties to the case, and to all the special facts in the proceeding. The case arose upon an appeal which presented everything in the record. The court found that it was a case of purely civil contempt; but that the court below had undertaken to proceed as in a criminal case, had found guilt, and imposed sentence, without having made it clear to the defendants that they were being tried upon a criminal charge, that the defendants had been forced to testify without knowing that they were being heard upon a charge and not upon a suit. From the special circumstances of the case the court clearly showed that the defendants were not given the protection to which respondents are entitled in a case where guilt or innocence are brought into question and where the liberty of the citizen is involved. The court showed that both parties to the controversy treated the proceeding as purely and solely civil, and not involving a criminal charge. The court clearly pointed out that in a case of doubt the mutual understanding of the parties is of controlling force, and often determines the question of whether the civil or the criminal element dominates the proceeding.

"The case at bar comes before us upon a writ of error, and presents only such questions as arise under the exceptions and are stated in the assignment of errors. This contempt proceeding was distinct and separate from the original equity cause. It arose upon a petition for contempt in which the petitioner stated facts sufficient to bring

before the court both the civil and criminal elements of contempt, and in which the aid of the court was invoked, both to compensate the complainant and also to vindicate its authority. The case clearly shows that the defendant had a fair and full trial on the question of criminal contempt. At the special request of the defendant himself, the Circuit Court ruled that:

" 'This proceeding is a criminal proceeding, reviewable in error; and the rule of evidence as to the proof of the offense beyond a reasonable doubt, including the element of criminal contempt, is applicable'."

"This ruling gave the defendant the clear, specific safeguard of a trial upon a criminal charge. There was a common understanding of all parties that he was having such trial. He has had his day in court at a hearing in which the criminal element dominated the proceeding; and he himself admits that he has been tried and sentenced upon a criminal proceeding, where the rule of evidence as to the proof of the offense beyond a reasonable doubt was made to apply. It is not, then, necessary to critically consider the forms of the proceedings to find out that the defendant had the proper protection to which he was entitled in a case where a criminal charge was made against him. It is true that in the case at bar many of the different forms were present which in the Gompers Case induced the Supreme Court to hold that proceeding to be solely a civil one; but the court was providing for the ample protection of the citizen where a criminal charge was made against him. It was not undertaking to enumerate the different things which must be present in order to make a criminal proceeding. The case

now before us was, in its dominant element, confessedly and unquestionably a criminal proceeding. We are not obliged to examine the mere form to find its character.

"In our opinion the sentence of 10 days imprisonment was properly and lawfully imposed.

"Was it error for the Circuit Court to pass upon both the punitive and remedial elements in one proceeding?

"The Circuit Court imposed a punitive sentence. By its ruling it allowed the criminal element to dominate the proceeding. It also made an award of compensation for the complainant. Of this latter action the defendant complains, and says that it was error for the court to take such action. We have already discussed the award of compensation, standing by itself, and have found it to be free from error. It is our duty now to briefly consider the question presented by the Circuit Court having taken action upon both the punitive and civil aspects of the case in one proceeding, although there may be doubts whether this question fairly arises upon this writ of error.

"In discussing the action of the court upon the criminal side we have found that the mutual understanding of the parties was of great and, perhaps, determining force. Here again, upon the remedial side, the understanding of the parties is of great moment. The record shows that, while the defendant requested the court to rule that the case was a criminal one, the defendant also requested rulings which pertained simply and only to the civil side of the case. It appears then that both parties assumed that, while the civil rights of the parties were involved, the court was asked to proceed further to vindicate its authority. The

Circuit Court made its two awards, its compensatory award and its punitive award, in one proceeding. In doing so it followed the practice of the courts in this circuit and in other circuits. This practice had no less a sanction that that of Judge John Lowell, and of Judge Nelson in *Hendryx* v. *Fitzpatrick,* (C. C.), 19 Fed. 810, 813, where the circuit court in this circuit held that the process of contempt had two distinct functions, one criminal to punish disobedience, and the other civil and remedial; that in patent causes the practice has been to combine the two under a proper proceeding, and to order punishment if it be thought proper, and to indemnify the plaintiff if it is thought proper, or to do both if justice require; that in patent causes it has been usual to embrace the public and the private remedy in one proceeding. This has been held to be the proper practice by Mr. Justice Miller in *In re Chiles,* 22 Wall. 157, 168, 22 Law Ed. 819.

"In the Gompers Case the court has nowhere said that this practice of the several circuits in patent causes is improper or illegal. Under the principles announced in that case it must, of course, appear in a cause in equity that, before imposing a sentence for criminal contempt, the court distinctly gave the defendant his day in court and allowed him a full and fair hearing upon a criminal charge. In that case the Supreme Court recognizes that the practice with reference to contempt proceedings had been unsettled. It does not condemn the practice of the Circuit Court in the several circuits in equity causes in passing upon the punitive and civil aspects of the case in one proceeding. It does, however, hold with great force and clearness that a

citizen should not be compelled to face a criminal charge without being fully advised that he is facing such charge. We do not find that the Supreme Court has ever said that any particular form of proceeding is required, providing the defendant is left in no doubt as to what charge is made against him. . . . There was no necessity for the Circuit Court to delay the administration of justice by dividing the two elements, and insisting upon separate proceedings in each element. If there had been such necessity, the court might have proceeded with the remedial side of the case, and have then granted a motion to show cause at a further hearing why the defendant should not be tried upon the charge for criminal contempt. But in the proceeding before it the Circuit Court found that, upon a proper petition, upon ample notice, and with a full understanding, the parties might properly be heard upon both elements, and it allowed the criminal element to dominate the proceedings. Under the principles of the Gompers case, and under the prevailing practice of this Circuit, we find no error in the action of the Circuit Court."

Kreplik v. *Couch Patents Co.,* 190 Fed. 565,

"The injunction in this case was issued at the instance of the Board of Trade, to protect it from irreparable injury until the final decree could be rendered in the suit. The defendants in the suit, the plaintiffs in error here, must be assumed, for the purpose of the decision of this preliminary question, to have violated this injunction, and to have inflicted serious injury upon the Board while the suit was pending, and the Court fined them

for these unlawful acts, and ordered three-fourths of the fine to be paid to the Board and one-fourth thereof to the United States.

"Counsel for the defendants below argue that this is a judgment for a criminal contempt, because one-fourth of the fines are to be paid to the United States, and because the true line of demarcation between civil contempts and criminal contempts in their opinion was drawn by the Supreme Court of South Dakota in *State* vs. *Knight,* 3 S. D. 509, 514, 54 N. W. 412, 413, 44 Am. St. Rep. 809, and the contempt here in question falls on the criminal side of that line. The Court said:

" 'If the contempt consists in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil, and he stands committed until he complies with the order. . . . If, on the other hand, the contempt consists in the doing of a forbidden act, injurious to the opposite party, the proceeding is criminal, and conviction is followed by fine or imprisonment, or both; and this is by way of punishment. . . . This rule, as definitely stated, has not been expressly recognized by any case coming under our observation, but it is consistent with all the decisions.' "

"The opinion from which these quotations are made was written in the year 1893. While the line of demarcation there drawn may not have been inconsistent with any opinion coming under the eyes of the Supreme Court of South Dakota at that time, it is inconsistent with the later decisions of the Supreme Court of the United States. In *Ex parte Heller,* 214 U. S. 501, 29 Sup. Ct. Rep. 698, 53 Law Ed. 1060, Heller had been enjoined from using a certain trademark and from stamping

waistbands in a certain manner, and the Court that rendered the decree had adjudged him to be in contempt for violating the injunction, and had fined him $500. He had sued out a writ of error to the Circuit Court of Appeals of the Second Circuit, and that Court had dismissed his writ, on the ground that the contempt was not criminal. Heller had then applied to the Supreme Court for a mandamus to compel the Court of Appeals to take jurisdiction of and to decide his case on the merits of the writ of error, and the Supreme Court dismissed his petition, after quoting from the opinion of the Court of Appeals this declaration:

" 'It is well settled that, when an order imposing a fine for a violation of an injunction is substantially one to reimburse the party injured by the disobedience, it is to be reviewed only by appeal.'

"The truth is that substantial benefit to a private party preponderating over that to the government is the distinguishing characteristic of a civil contempt, and that benefit is often as great and it arises as frequently from judgments for contempts for disobedience of a prohibitory as of a mandatory order or judgment. In view of this fact, and of the decisions of the Supreme Court which have been cited, we adhere to our earlier statement of the nature and of the distinction between criminal and civil contempts which was made in *In re Nevitt,* 54 C. C. A. 622, 632, 117 Fed. 448, 458, was approved by the Supreme Court in *Bessette* vs. *W. B. Conkey Co.,* 194 U. S. 324, 328, 24 Sup. Ct. Rep. 665, 48 Law Ed. 997, and was affirmed by this Court in *Clay* vs. *Waters,* 101 C. C. A. 645, 178 Fed. 385, 389, which reads:

" 'Proceedings for contempts are of two classes

—those prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the Court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce.'" (Citation.)

"The proceedings upon which the defendants below were adjudged to pay their fines were instituted and conducted, not by the government for an affront to the dignity of the court, but by the complainant below, the Board of Trade of Chicago, to protect its property from continuing trespasses, and to save itself from irreparable injury *pendente lite*. They were based on its petition and its counsel presented the evidence in support of it. Neither the United States Attorney, nor any other officers of the government, nor any representative of the people, took any part in the prosecution or had any special interest therein. The purpose of the proceeding was to protect the Board from irreparable injury, and its property, its continuous quotations of the market reports, from continuing trespasses and appropriation by the defendants, by enforcing the injunction which the Court had granted to the complainant for that very purpose. The chief object of the fines was to coerce the defendants to obey the injunction during

the pendency of the suit and to reimburse the complainant for the expenses of its prosecution of the proceedings for contempt.

"It is true that the Court below directed that one-fourth of the fine should be paid to the government and that the Supreme Court held, in *Matter of Christensen Engineering Co.,* 194 U. S. 458, 461, 24 Sup. Ct. Rep. 729, 48 Law Ed. 1072, where one-half of the fine was payable to the United States, that the punitive element dominated the proceeding in that case, and made the complaint criminal and not civil. But in the case at bar the punitive element was incidental, and the civil purpose to protect the property of complainant was the only real object of the proceeding. The Court below never estimated an affront to its dignity and a defiance of its power at one-third of the expense of the proceedings or of the value of complainant's property taken in violation of the injunction. It ordered three-fourths of the fine paid to the complainant and one-fourth to the government for the single dominant object of the proceedings, for the purpose of protecting and preserving the complainant's property and coercing the complainant to obey its injunction that this purpose might be accomplished.

"In every civil as well as in every criminal contempt there necessarily inheres an affront to the dignity and a defiance of the power of the Court and a liability to punishment therefor. The liability to punishment for an affront to the dignity of the Court cannot, therefore, distinguish a civil from a criminal contempt, for it always exists in each. Yet every contempt is either a civil contempt or a criminal contempt. What, then, is the distinguishing characteristic between them? It is

the dominating object of the prosecution and the party chiefly interested therein. If the chief purpose of the proceeding for contempt is to enforce the rights and administer the remedy to which courts have adjudged or may adjudge a private party to be entitled, and if such a private party is the one chiefly interested in it, the proceeding is for a civil contempt. If the chief object of the prosecution, as in cases of misconduct in court, or disobedience of a subpoena, is, by punishment of the offender to preserve the power and vindicate the dignity of the Court, and if the party chiefly interested in the prosecution is the government or the public, the proceeding is for a criminal contempt."

Merchants' Stock & Grain Co. vs. *Board of Trade,* 187 Fed. 398.

In the case at bar the moving papers stated facts sufficient to bring before the Court acts constituting both civil and criminal contempt. No objections were made to the form of those papers. The sworn answers admit all the material allegations and show that, under an alleged misconception of the law, the plaintiffs in error, while claiming to have the "highest and sincerest regard for the Judge of this Hon. Court, and the greatest respect for the Court over which he presides," nevertheless deliberately and intentionally disobeyed its lawful orders. There is, and can be, no question as to the evidence. *Fairfield* vs. *United States,* 146 Fed. 508. The Court in fining them for contempt in violating the order restraining C. E. Wylie from disposing of any of the property of the Exploration Mercantile Com-

pany directed a repayment of the money which was shown to have been taken in violation of the order.

In the Gompers case, *supra,* it is expressly held that the civil case out of which the contempt grew, including the matter involved in the contempt proceeding so far as the parties were concerned, had been fully compromised and settled, and, therefore, the Court could not make any order of a remedial nature as for a civil contempt. It is stated, however, that if there had been no settlement the Court would have made its order in accordance with the facts found and vindicate its authority. As it could not do so the cause was dismissed without prejudice to a proper proceeding for criminal contempt.

In the case at bar there is no such condition, and the payment of the fines as provided in the order will only partly recoup the damages suffered by reason of the contemptuous acts established.

The form of prayer in the moving papers is complained of for the first time in this Court.

The motion shows that the parties charged were required to show cause why an attachment for contempt should not issue against them for disobedience of the orders of the Court; the order to show cause directed them to show cause why they should not be adjudged guilty of contempt for disobedience of the lawful orders of the Court; and the affidavit served with these papers shows specifically what were the contemptuous acts. This is sufficient under the rule as to the requirements of pleading in contempt.

> See authorities cited under paragraph II, subdivisions 6 and 7, *supra.*

In a doubtful case, as was done in the Gompers case, the prayer may be looked to in determining whether the proceedings be for civil or criminal contempt; but it cannot be jurisdictional where the party has not been misled and has had his day in court, and has made no objection in the trial court.

In the case of *S. Anargyros* vs. *Anargyros Co.,* 191 Fed. 208, there was a disobedience of an injunction, which, on appeal, had been held improperly issued; that is, the order granting the injunction had been reversed when the contempt matter came before the Court. No remedial relief could, therefore, be granted. The moving papers were apparently attacked before the trial court and were held insufficient, in the absence of anything else in the pleading to show that a criminal contempt was intended. The trial court in the opinion says:

> "Furthermore, there is an entire lack of any prayer, demand or suggestion that respondents be punished in any manner. While *such specific demand is perhaps not essential to enable the Court to afford relief of a private and remedial character appropriate to the facts,* it is very clearly essential in a proceeding seeking the punishment of a respondent as for a criminal contempt; and especially should this be so where there is an absence of anything else in the pleading to definitely point the nature of the judgment sought."

The prayer is therefore sufficient in the case at bar. The moving papers were in the usual form as indicated by Loveland on Bankruptcy (3rd ed.), forms, Nos. 115, 116 and 117, p. 1111 *et seq.*

This is a case of civil contempt.

Following the argument of the Gompers case, it appears:

The dominating part of the punishment is remedial and not punitive;

The proceedings are between the parties to the bankruptcy matter;

The papers are entitled in the bankruptcy matter and not the United States against the persons charged;

The petitioning creditors were the actual and nominal parties on the one side and the persons charged on the other;

The case was treated as a part of the bankruptcy proceeding;

Stipulations were made by the parties;

The petitioning creditors have been the sole parties in opposition to the persons charged with contempt, and their counsel, in their names, have filed briefs and made arguments; and,

The record and evidence in the bankruptcy case were offered in evidence in the contempt trial.

Furthermore, the plaintiffs in error, after the trial of the contempt matter submitted a brief and argued to the trial court that, "Here the charge against us is prosecuted as a civil contempt." And this, it must be remembered, was after the decision had been handed down in the case of *Morehouse* vs. *Pacific Hardware & Steel Co.,* 177 Fed. 337. What is there said with reference to this being a criminal contempt is not the law of the case, for several reasons:

First. The facts have materially changed by reason of the filing of the answers and the acts and understanding of the parties; and,

Second. The remark was not material to the decision of the case. The ground of the decision was that the matter complained of was not reviewable until the petitioners shall have been adjudged guilty of contempt in the court below; and that the order to show cause was but process. Nor was it necessary to sustain the argument for the court to have gone further than to say that the proceeding was for an affront to the dignity of the court, without determining whether it was civil or criminal contempt.

> "A proposition once decided" (is the law of the case) "only when the facts properly controlling its decisions on the subsequent appeal or writ of error are substantially the same as before."
>
> *Brown* vs. *Lanyon Zinc Co.,* 179 Fed. 309;
> *Crotty* vs. *Chicago, etc.,* 169 Fed. 593.

> "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which these opinions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for discussion."
>
> Chief Justice Marshall in *Cohen* vs. *Virginia,* 6 Wheaton, 399.

> "We recognize that what was decided in a case pending before us on appeal is not open to reconsideration in the same case on a second appeal upon similar facts. The first decision is the law

of the case, and must control its disposition; but the rule does not apply to expressions of opinion on matters, the disposition of which was not required for the decision."

> *Barney* vs. *Winona,* 117 U. S. 228, 231, 6 Sup. Ct. Rep. 654, 29 Law Ed. 858.

When the case was here before, moreover, there was not a word said in the briefs, or on oral argument, upon the question.

It therefore appears that this is a civil contempt, and, not being reviewable by writ of error, the proceeding in this court must be dismissed.

> *Merchants' Stock & Grain Co.* vs. *Board of Trade,* 187 Fed. 398, and cases cited.

III.

The third alleged error assigned is that the District Court had no power or authority to issue the injunction for the reason that the property of the bankrupt was then in the possession of the state court, and not of the bankrupt, that the issue of bankruptcy had not been determined and the plaintiffs in error were never made parties to the bankruptcy proceeding.

If an injunction is absolutely void, as where the court is without jurisdiction to grant it, a violation thereof is not contempt. But that is not the case here. On the contrary the injunction was in all respects proper.

Where, however, the court had jurisdiction, the fact that an order of injunction is merely erroneous, or was

improvidently granted or irregularly obtained, is no excuse for violating it.

22 Cyc. 1009, and authorities cited in note 82.

The Federal Court as a Court of Bankruptcy, not only has the power and jurisdiction, but will restrain every proceeding in a state court which would defeat the Bankruptcy Act.

In re Hornstein, 122 Fed. 266, 271;
In re Knight, 125 Fed. 35;
Loveland on Bankruptcy (3rd ed.) p. 111;
Remington on Bankruptcy, Vol. 1, Secs. 1602, 1605;
In re Brown, 91 Fed. 358.

The provisions of the Act of Bankruptcy would be defeated by allowing the bankrupt to select his own trustee to administer upon his estate, instead of his creditors; and the power granted to Congress, "To establish an uniform Rule of Naturalization, and Uniform Laws on the subject of Bankruptcies throughout the United States," Const. U. S., Art. 1, Sec. 8, Sub. 4, would be effectually destroyed by allowing the state court to take jurisdiction of the estate of the bankrupt, and administer and distribute it.

In re John A. Ethridge Furniture Co., 92 Fed. 329, 332.

That Messrs. Stone, Wylie and Hobbs did so attempt to evade the provisions of the Bankruptcy Act is clearly shown from the opinion of the District Court, Transcript, pages 116 to 123, inclusive, a part of which reads as follows:

"The evidence is very conclusive that each of the three men knew the business was running behind, and wished to conceal that fact. When the creditors were about to commence attachment suits, Mr. Stone, who had received the $48,000.00 credit, who had mutilated the journal, who had withheld his own account from examination, who was then the actual owner of 96 per cent of the stock of the concern, filed in the state court a petition asking that court to wind up the corporation, and place its property in the hands of a receiver because litigation was threatened and the assets were likely to be wasted. Mr. Wylie, general manager of the corporation, immediately appeared in court and filed an admission of service for the corporation, and a request that he himself be appointed receiver. This proceeding in the state court was certainly in harmony with the previous and subsequent conduct of the three men; it was but a part of a scheme to hinder and delay and therefore defraud the creditors of the Exploration Mercantile Company, and the scheme was participated in, and consistently pushed and carried out by all the officers of the corporation, by its president, secretary and treasurer, general manager and directors, and by all its stockholders.

"It is alleged, and the testimony shows, that all the directors, officers and stockholders of the Exploration Mercantile Company, as the act and deed of the corporation, caused the Stone petition to be filed and a receiver to be asked for, and later that they, in behalf of said corporation, as its act and deed, moved the court for an order appointing Wylie receiver. It is also averred that the corporation ratified the act. It is also alleged, and amply proven by the testimony, that this was all done to

hinder, delay and defraud its creditors; and it is clear from the testimony that these persons, Stone, Wylie and Hobbs, knew the corporation was insolvent at the time the receiver was applied for. Under the shelter of a receivership, which tied the hands of the creditors, they proposed themselves to control its business and conceal its actual condition."

Transcript, pp. 121, 122 and 123.
See also opinion in Contempt, Trans., p. 136.

Messrs. Morehouse and Thompson at all times knowingly, wilfully and contemptuously counseled, advised, induced, aided and abetted these men in their violation of the order of the District Court of the United States. They were confederates.

Transcript, pp. 93, 94, 95, 137, 157.

These facts on writ of error may not now be disputed.

In re Grove, 180 Fed. 62, 64.

The bankrupt law is paramount to all the state insolvent laws, and where the effect of enforcing the state law is to defeat the object and provisions of the Bankrupt Act, that part of the state law must yield to the provisions of the latter.

Cresson & Clearfield Coal & Coke Co. vs. *Stauffer,* 148 Fed. 981;
1 Remington Bankruptcy, Secs. 1603, 1634;
U. S. Rev. St. Sec. 711, 4 Fed. Stat. Ann. 493, 497;

Bankruptcy Act., Sec. 2, Sub. (7) and (15); (4), (13) and (16).
Opinion, Transcript, 133 to 148, and cases cited.

Furthermore, the order of the state court dissolving the corporation and appointing Mr. Wylie receiver, was void, because all the directors were not joined as parties to the proceeding, and thus no jurisdiction had been obtained "over the natural persons interested in the subject matter of the orders at the time they were made."

Hettel vs. *District Court,* 30 Nev. 382, 96 Pac. 1062;
Golden vs. *District Court,* 31 Nev. 250, 101 Pac. 1021.

The order dissolving the corporation and appointing a receiver being void, Mr. Wylie was but a bailee for the Exploration Mercantile Company; his possession was not a case of "adverse possession, or the possession in enforcement of pre-existing liens;" he, Stone and Hobbs were still officers of the corporation. Mr. Morehouse and Mr. Thompson were their attorneys.

Opinion, Transcript, p. 137.

The remaining point in the third assignment of alleged error is completely answered in the opinion of the Hon. Judge of the trial Court, beginning on page 151 of the transcript in the following language:

"It is objected that respondents were not, and could not have been, made parties to the original bankruptcy proceedings; therefore the court had no jurisdiction over them, and they could not be

enjoined at all. It is sufficient to say that under section 2 (15) quoted above, the bankruptcy court has power between the filing of the petition and adjudication, as well as afterward, to enjoin persons within its jurisdiction, whether parties to the bankruptcy proceeding or not, from making any transfer or disposition of any part of the debtor's property, or from doing any other thing which will interfere with the administration of the Bankruptcy Act. The petition for such an injunction should be filed and the injunction issued in the bankruptcy proceeding itself. 1 Remington on Bankruptcy, Secs. 359, 361; *In re Jersey Island Packing Co.,* 138 Fed. 265; *In re Globe Cycle Works,* 2 Am. Bank Rep. 447.

"Section 2 (13) of the Bankruptcy Act supplies the Court with authority to enforce obedience to its lawful orders, not only from bankrupts, but also from other persons.

"In *Boyd* vs. *Glucklich,* 116 Fed. 135, the Court declares that 'any act, matter, or thing which any United States court may punish as a contempt may be punished as such by a court of bankruptcy.'

"Section 725, Rev. Stats. U. S., vests the Federal Courts with power 'to punish by fine or imprisonment, at the discretion of the Court, contempts of their authority; . . . and a disobedience or resistance . . . by any party, juror, witness *or other person* to any lawful writ, process, order, rule, decree or command of the said courts.'

" 'To render a person amenable to any injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor have been actually served with a copy of it, so long he appears to have had actual notice.'

"In re Lennon, 166 U. S. 548; *American Steel*

etc. Co. vs. *Wire Drawers' Union,* 90 Fed. 598, 604; *Phillips* vs. *Detroit,* 19 Fed. Cas. No. 11,101.

"None of the respondents were formal parties to the bankruptcy proceeding. The order which restrained Mr. Wylie and the Exploration Mercantile Company from selling or otherwise disposing of its property, does not include or restrain Mr. Stone, Mr. Morehouse, Mr. Thompson, or Mr. Hobbs by name, or by any general description. The injunction prohibiting further prosecution of the suit in the State Court, and all further steps and proceedings therein, runs against the Exploration Mercantile Company, Mr. Stone, Mr. Wylie, and the agents, servants, attorneys and counselors of each of them. Mr. Hobbs, Mr. Thompson and Mr. Morehouse are not expressly named therein. The omission of the name of Mr. Stone, or the name of any other respondent, however, did not give any authority or permission to advise, persuade, or compel Mr. Wylie to disobey or ignore the orders of this Court. Orders and injunctions are among the instruments with which Courts accomplish their ends, and perform their duties. Any person, be he party or not, who knowingly thwarts the purpose of the Court, either by resisting its commands, or wilfully counseling, aiding, abetting, inducing or compelling the party who is enjoined, to resistance or disobedience, acts at his peril. While such conduct, under some authorities, may not constitute a technical breach of the injunction, it is, nevertheless, disrespectful to the Court, and may be treated and punished as contempt, under section 725, *supra.*

"It is said in *In re Reese,* 107 Fed. 942, 945, that 'The power to punish for contempt is not limited to cases of disobedience by parties to the suit,

of some express command of rule against them, but, subject to the limitations imposed by section 725, *supra,* is coextensive with the necessity of maintaining the authority and dignity of the court'."

"It is the usual practice in granting an injunction against a corporation to extend the injunction to officers, attorneys, agents and employees of the company. And this is just as effectual against such servants, officers, employees and attorneys as though they were parties defendant to the original bill.

"*Sidway* vs. *Missouri Land & Livestock Co.,* 116 Fed. 381, 390; *Toledo etc. Ry. Co.* vs. *Penn. Co.,* 54 Fed. 746; *Hedges* vs. *Court,* 7 Pac. 767.

"Such an injunction is binding, not only upon the corporation, but on each individual who acts for the corporation in the transaction of its business, provided he has knowledge of the writ and its contents.

"*Ex parte Lennon,* 64 Fed. 320; *People* vs. *Sturtevant,* 59 Am. Dec. 536, 546; *Morton* vs. *Superior Court,* 4 Pac. 489; 2 High on Inj., sec. 1443.

"The rule that a stranger to the suit can be punished for contempt rests not only on the clear language of the statute itself, but on the broad doctrine that the power to make an order carries with it an equal power to enforce the order by punishing those who disobey or resist it. Otherwise the lawful commands and purposes of the Court might be thwarted, and brought to naught by the resistance of strangers.

"In *Seaward* vs. *Paterson,* 1 Ch. 545, 76 L. T. N. S. 215, an injunction was issued against Paterson to restrain him from holding glove-fights or

boxing contests on certain premises. One Murray who had later acquired possession of the premises and conducted boxing contests thereon, was cited for contempt. It was insisted in his behalf that he was neither a party to the action nor an agent or servant of such party, and that consequently he could not be held. He was adjudged guilty of contempt, however, on the ground of knowingly aiding and assisting in doing that which the Court had prohibited. In approving of this action on the part of the trial court, the court of appeals drew a distinction between the kind of contempt here complained of and that which consists in a disobedience to an order by a party to the suit. Among other things, Lindley, L. J., after observing that Murray was not a party to the action, either first or last, but that he knew all about the order and was responsible for the violation of it, said: 'Now, let us consider what jurisdiction the court has to make an order against Murray. There is no injunction against him. He is no more bound by the injunction granted against Paterson than any other member of the public. He is bound, like other members of the public, not to interfere with, and not to obstruct the course of justice; and the case, if any, made against him must be this—not that he has technically infringed the injunction which was not granted against him in any sense of the word, but that he has been aiding and abetting others in setting the court at defiance, and deliberately treating the order of the court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is no jurisdiction to attach him for contempt as distinguished from a breach of the injunction. . . . I confess that it startled me, as an old

equity practitioner, to hear the jurisdiction contested upon the facts in this case. It has always been a familiar doctrine to my brother Rigby and myself that the order of the Court ought to be obeyed, and could not be set at naught and violated by any member of the public either by interference with the officers of the court, or by assisting those who are bound by its orders.' To the same effect see:

"*Bessette* vs. *W. B. Conkey Co.,* 194 U. S. 324; *Wellesley* vs. *Earl of Mornington,* 11 Beav. 181.

"*In re Reese, supra,* is much relied on by respondents. That case arose out of labor difficulties in Kansas. An injunction has been issued out of the Federal Court against some 46 named persons, and other citizens of Kansas, 'who have or may combine or confederate with them, restraining interference with complainant and its employees.' Reese came with three hundred men from Iowa. It is charged that he interfered with complainant's miners, but not that he aided or abetted defendants, or confederated with them, or that he was an agent, servant or employee. He was not a citizen or resident of Kansas. He seems to have acted independently of the defendants. The Court held that he could not be punished for violating the injunction, because he was neither a party to the case itself, nor agent, servant, employee or attorney of any part or party thereto, and inasmuch as he had not been charged with aiding, abetting or confederating with them, he was discharged.

"In the present case all the evidence tends to show that Wylie, Stone, Morehouse and Thompson were acting together as allies and confederates; that Mr. Stone was their leader. The charge is

that Stone wilfully and contemptuously demanded and received from said C. E. Wylie certain sums of money. Thompson and Morehouse are charged with actively counseling and advising Wylie to disobey the orders of this Court, and to pay the money demanded by Stone.

"This distinction is a very important one, and it brings the conduct of the respondents just named clearly within the following rule stated by Judge Adams in the Reese case:

" 'It is entirely consonant with reason, and necessary to maintain the dignity, usefulness and respect of the court, that any person, whether to a party to a suit or not, having knowledge that a court of competent jurisdiction has ordered certain persons to do or abstain from doing certain acts, cannot intentionally interfere to thwart the purposes of the court in making such order. Such an act, independent of its effect upon the rights of suitors in the case is a flagrant disrespect to the Court, which issues it, and an unwarrantable interference with, and obstruction to, the orderly and effective obstruction of justice, and as such, is and ought to be treated as contempt of the court which issued the order.'

"In *Huttig Sash & Door Co.* vs. *Fuelle,* 143 Fed. 363, there was a temporary order enjoining defendants from boycotting complainant in person or through the agency of others. Several of the defendants were cited to show cause why they should not be punished for contempt. With them were joined three persons, Bohnem, Crowe and Mellville, who were not defendants in the original suit, and were not named in the restraining order. They are charged, however, with aiding, abetting and assisting others in violating the restraining or-

der. All were found guilty of contempt, including the three parties last named.

"The case at bar is like the one just cited. Stone, Morehouse and Thompson are not named as defendants. The restraining order does not run in terms against agents, employees, or attorneys, but it is charged that Stone wilfully and contemptuously demanded and received from C. E. Wylie certain sums of money; that Thompson and Morehouse wilfully and contemptuously demanded and received the sum of $1000.00; and that Thompson advised and counseled Wylie to pay Stone's demand. The evidence shows that Stone on the very day he was served with the restraining order gave notice that the rent of the building owned by him and occupied by the company would be raised from $500 to $1,500 per month; and later he actually collected $1,500 rental for the month of December. He also threatened to bring suit for rent and trebble damages, and notified Wylie to vacate. Morehouse and Thompson advised the payment of the money to Stone. The conduct charged and proven certainly is that of counseling, aiding and abetting Wylie in his violation of the restraining order.

"In *Sloan* vs. *The People,* 115 Ill. App. 84, 89, it was held that under charge of violating an injunctional order a respondent may be convicted of aiding and abetting others in such violation as the former charge includes the latter."

IV.

The fourth assignment of alleged error, that C. E. Wylie was the receiver of the State Court, and, as such, could not be enjoined because beyond the injunctive

process of the United States Court, and that his attorneys were in like case, has been fully answered in paragraph III of this brief.

V.

The fifth alleged error assigned, that the Court had no jurisdiction because the suit in the State Court was not founded upon a claim from which a discharge in bankruptcy would be a release, has also been fully answered in paragraph III of this brief.

See also Opinion, Trans., pp. 137-148, inclusive.

VI.

The sixth alleged error assigned, that the plaintiffs in error were not parties to the bankruptcy proceedings, that all their acts were as officers of the State Court, which alone had jurisdiction until adjudication in bankruptcy, and that they are not charged with anything done after adjudication, has been answered in paragraph III herein.

VII.

The seventh alleged error assigned is that the property was in the possesseion of the State Court through its receiver, holding adverse to the bankrupt, and, therefore, he could not be proceeded against by any summary process, for that would be violating his possession without "due process of law," and that he dared not obey the injunction as it would place him in contempt of the State Court.

But it has already been shown that the receiver was

not holding adversely to the bankrupt. The order dissolving the corporation and appointing a receiver being void, Mr. Wylie was but a bailee for the Exploration Mercantile Company. (Trans., p. 137.) And, had it not been void, it is a settled fact in the case that the plaintiffs in error were confederated together and there was no adverse holding. (Trans., pp. 123, 136.)

And, furthermore, the contention has been fully answered in paragraph III, *supra*.

VIII.

The eighth alleged error assigned is that the injunction and stay order were only preliminary and not perperpetual, and therefore ceased on the date of adjudication, and that no jurisdiction remains to take proceedings after that time.

But the orders themselves provide that they shall be in force, the one, "until our District Court shall make further order in the premises," and the other, "until the decision of this Court upon the motion." (Trans., pp. 16, 20.) And it has now been duly found as a fact in the case, which is not, and cannot be, questioned in this Court.

> "That said two orders have been at all times since their issuance, and now are, in full force and effect, and have not been modified."
>
> Trans., p. 90.

The fact that an injunction has been erroneously or irregularly granted, or that there is an irregularity or error in the order itself, is no excuse for it violation.

> "If the court acquired jurisdiction, and did not

exceed its powers in the particular case, no irregularity or error in the procedure or in the order itself could justify disobedience of the writ. (*Elliott* v. *Persol,* 1 Pet. 340; *Ex parte Watkins,* 3 Pet. 193; *In re Goy,* 127 U. S. 731, 8 Sup. Ct. Rep. 1263.) The considerations of public policy on which this rule rests are too plain and well understood to need restatement.

"Was the case one of which the court had jurisdiction? No question is made, or could be made in proceedings for contempt, of the sufficiency of the petition for the injunction in matters of form and averment merely."

United States vs. *Debs,* 64 Fed. 729, 739.

See also:

Trans., p. 133;
22 Cyc. 1009;
Wells vs. *Oregon R. & N. Co.,* 19 Fed. 20.

The offense was complete long before the adjudication. The wrong was done while the injunction was in force. Nothing has transpired to excuse the contemptuous acts. The fact of adjudication confirmed the propriety of the injunction, it could not, surely, abolish the remedy for its breach.

IX.

The ninth alleged error assigned is that the answer of the plaintiffs in error, being under oath, is a complete defense, and, therefore, the court had no power to render judgment against them.

The sworn answers admit and aver that the plain-

tiffs in error deliberately and intentionally disobeyed the Court's orders. The theory is the same as it would be were a person charged with crime to set up as a defense that while he admitted the crime in every particular and the intent to commit it, nevertheless, he should not be punished because he had the highest respect for the person against whom the crime was directed. The misapprehension of the law, which the plaintiffs in error invoked in an attempt to hinder, delay and defraud the creditors of the bankrupt, cannot avail them, for, *"Ignorantia juris neminem excusat."*

21 Cyc. 1726, and authorities cited, note 67.

In a proceeding for contempt in a court of equity or bankruptcy, the answer of the respondent, though under oath is not conclusive, and his denial of the contempt does not entitle him to a discharge.

In re Fellerman, 149 Fed. 244;
United States vs. *Shipp,* 203 U. S. 563, 51 Law Ed. 319;
Kirk vs. *United States,* 192 Fed. 273;
Merrimack River Savings Bank vs. *City of Clay Center,* 219 U. S. 527, 31 Sup. Ct. Rep. 295.

This has always been the rule in equity and a court of bankruptcy is a court of equity.

Clay vs. *Waters,* 178 Fed. 385, 394.

X.

The tenth alleged error is that the case being for criminal contempt the plaintiffs in error cannot be

held guilty except beyond a reasonable doubt, and it appears by the record that they were acting under an honest belief that their acts were lawful.

It has been found as a fact, which, as has already been shown, cannot be questioned upon a writ of error, that they and each of them, knowingly, wilfully and contemptuously disobeyed the lawful orders of the Court.

Trans., pp. 90 to 95, inclusive.

The evidence not having been brought up, the fact is finally established no matter what degree of proof is required.

The question as to whether this is a case of civil or criminal contempt has been fully discussed in paragraph II of this brief.

XI.

The eleventh alleged error assigned is that all the acts done in violation of the orders of the United States Court were done under the authority of the State Court.

But the State Court was invoked for the very purpose of avoiding the rights of the creditors of the bankrupt and by application to the State Court the plaintiffs in error could at any time have been permitted to obey the United States Court. Indeed, it would not have been necessary to do that, for the obedience to the latter court would not have conflicted with any duty or order of the State Court.

The evidence as to these matters not having been brought up by bill of exceptions, however, this Court

will not inquire into the facts. The action of the trial Court is conclusive.

And, as shown by the opinion of the trial Court, the State Court never had jurisdiction.

> *Golden* vs. *District Court,* 31 Nev. 250;
> See also Opinion, Trans., pp. 133-148, and paragraph III of this brief.

XII.

The twelfth alleged error assigned is that, although the United States Court had jurisdiction, it was the duty of the State Court to settle the accounts of the receiver it had appointed and allow him his counsel fees.

The answer to this contention is admirably stated in the opinion of the trial Court (Trans., p. 149), as follows:

> "The fact that the $1,000 received by Mr. Thompson and Mr. Morehouse from Mr. Wylie was paid ostensibly as attorneys' fees does not, in my opinion, excuse them. Their appropriation of the money was in defiance of the order of this court. Their services were performed in an unsuccessful attempt to enable an insolvent corporation, guilty of an act of bankruptcy, by the very act of bankruptcy to defeat the jurisdiction of this court. Their efforts resulted in litigation, obstructing the bankruptcy proceedings, and causing delay and great expense, with no benefit whatever to the estate. Even though they believed they were within their legal rights, and that the state court had priority of jurisdiction, that fact affords no reason why the estate should pay them

for making such an error, or for performing services which were of no benefit.

"*In re Zier & Co.*, 142 Fed. 102."

Furthermore, the State Court had no jurisdiction, as already pointed out in paragraphs III and XI, *supra*.

XIII.

The thirteenth error alleged is that the petitioning creditors invoked the jurisdiction of the State Court and are, therefore, estopped from presenting to the United States Court the facts showing the contempt of the latter Court.

To which it is sufficient to answer:

1. That the evidence is not before this Court and that the action of the United States District Court is conclusive.

2. That the petitioning creditors appeared specially in an endeavor to show the State Court the true state of the case and to prevent a violation of the orders of the United States Court, and expressly reserving their rights as petitioning creditors; that it is not true that the allowance was made on their own motion; and that the steps named were taken by the plaintiffs in error in further pursuance of their plans to hinder, delay and defraud the petitioning creditors.

Trans., pp. 121-123.

3. That the State Court was without jurisdiction.

Golden vs. *District Court,* 31 Nev. 250.

XIV.

The fourteenth alleged error assigned is that W. P. Fuller & Co. was the moving party in the State Court and not the plaintiffs in error.

Again, it must be said, this is a question of fact which has been finally settled against the petitioning creditors. The proceedings in the State Court were taken by the plaintiffs in error as found by the Court.

Trans., pp. 93, 94.

XV.

The fifteenth alleged error assigned is that the petition in bankruptcy did not pray for an injunction or stay order, that the plaintiffs in error were not parties to the bankruptcy proceeding, that the affidavit upon which the restraining orders were issued is insufficient to give jurisdiction, and that the Court was without jurisdiction because the property was in the hands of the receiver of the State Court.

> 1. "It is improper to incorporate in a creditors' petition for an adjudication in involuntary bankruptcy allegations charging other creditors with having received voidable preferences, or a prayer for the seizure of property of the alleged bankrupt in the possession of adverse claimants, or a prayer for an injunction forbidding a receiver of the respondent, appointed by a state court, to distribute the property in his hands, as such matters can only be litigated in a separate proceeding. Such allegations and prayers are multifarious, and will be considered as stricken out."

(Syllabus) *Mather* vs. *Cole,* 92 Fed. 333.

It has been repeatedly held that the method adopted in the case at bar, by separate petition, is the proper one.

> *In re Jersey Island Packing Co.,* 138 Fed. 625;
> *Horner-Gaylord Co.* vs. *Miller & Bennett,* 147 Fed. 295;
> *In re Electric Supply Co.,* 175 Fed. 612;
> *Blake, Moffitt & Towne* vs. *Francis Valentine Co.,* 89 Fed. 691.

2. It has been fully shown in paragraph III, *supra,* that, under the circumstances of this case, it is entirely immaterial that the plaintiffs in error were not parties to the bankruptcy proceeding.

3. The petition for the restraining order, duly verified, is sufficient under the Bankruptcy Act, as is more fully shown in paragraph II of this brief.

> "If the court acquired jurisdiction, and did not exceed its powers in the particular case, no irregularity or error in the procedure or in the order itself could justify disobedience of the writ. . . . No question could be made in a proceeding for contempt of the sufficiency of the petition for the injunction in respect to matters of form and averment merely.
>
> *United States* vs. *Debs,* 64 Fed. 724, 739.

4. The relative jurisdictions of the State and Federal Courts have been fully shown in paragraph III hereof.

XVI.

The sixteenth alleged error assigned is that the plaintiffs in error acted in good faith, that they are attorneys at law representing only the receiver in the State Court, and that their answer cannot be traversed.

1. One is always held to intend the direct, natural and probable consequences of acts intentionally done. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion.

In re Rice, 181 Fed. 217, 224;
Agnew vs. *United States,* 165 U. S. 50, 17 Sup. Ct. Rep. 235, 41 Law Ed. 624.

Having ability to comply, and having intentionally and designedly disobeyed the order, realizing fully what is enjoined, the company cannot be heard to say that it did not intend disobedience to the process of the Court. The intent is shown by the act, which speaks for itself.

In re Home Discount Co., 147 Fed. 538, 555.

2. The question of fact as to what the plaintiffs in error were and who they represented, as already shown, cannot be now considered. And the fact is not correctly stated in the assignment of error.

> 3. "A proceeding in bankruptcy is a proceeding in equity, and for the purpose of enforcing and protecting its jurisdiction a court of bankruptcy has all the inherent powers of a court of equity."
>
> *In re Swofford Bros. Dry Goods Co.,* 25 Bankr. Repts. 282, 286, 180 Fed. 549.

In a proceeding for contempt in equity, a sworn answer, however full and unequivocal, is not conclusive.

Employers' vs. *Teamsters,* 141 Fed. 679, 686, 687;

U. S. vs. *Debs,* 64 Fed. 724, 738.

XVII.

The seventeenth assignment of alleged error is that the affidavit of P. F. Carney is insufficient to give the Court jurisdiction.

But, under the authorities cited in paragraph II, subdivision 6, the affidavit is clearly sufficient, and, having answered on the merits without objection, the question cannot now for the first time be raised.

Aaron vs. *U. S.,* 155 Fed. 833.

XIX.

The nineteenth assignment is an iteration of all the previous grounds, which have been fully answered.

It appears then, that there is no error in the record, that the judgment and order of the trial Court are just and equitable, and that, this being a civil contempt and not reviewable by writ of error, the action of the trial Court must be upheld and this writ dismissed.

XX.

The contentions of the plaintiffs in error will now be further considered.

1. The contention that this is a criminal contempt has been answered in paragraph II, *supra.* Plaintiffs

in error made an extended argument to the trial Court in their reply brief that this is a civil contempt.

"Consensus tollit errorem."

Broom's Legal Maxim, (8th ed.), p. 112.

Or, as stated in the Civil Code of California:

"Acquiescence in error takes away the right of objecting to it."

Civ. Code, Sec. 3516.

Much more, then, when counsel is correct in his contention, will he be held to stick to the views which he maintained in the trial Court.

2. The cases cited of

Kirk vs. *Milwaukee,* 26 Fed. 501;
U. S. vs. *A. T. & S. F. Ry. Co.,* 16 Fed. 853;
Ex parte Robinson, 19 Wall. 512;
Van Zant vs. *Argentine M. Co.,* 2 McCrary, 642;
Haight vs. *Lucia,* 36 Wis. 355;
N. O. vs. *Steamship Co.,* 20 Wall. 392;
In re Childs, 22 Wall. 163,

are all early cases. Some are not at all in point. In so far as they hold, or suggest, that under section 725, Revised Statutes, a Federal Court is limited to punitive measures and cannot, in a contempt proceeding, give remedial relief to the complainant, they have been overruled.

In re Nevitt, 117 Fed. 448, 453, 458, (C. C. A.);
In re Debs, 158 U. S. 564, 39 Law Ed. 1092;
Bessette vs. *Conkey Co.,* 194 U. S. 324, 48 Law Ed. 997;

And other cases cited in par. II, *supra.*

3. The old United States District Court for the district of Nevada was not abolished.

Sections 69 and 94 of The Judicial Code state concisely what was the existing law. Being substantially the same as existing statutes, they are made by section 294 continuations thereof. Hence, so far as the District Court of Nevada is concerned, there is no application to this case of the repeal of

> "All acts and parts of acts authorizing the appointment of United States Circuit or District Judges, or creating or changing judicial circuits or judicial districts, or divisions thereof," etc., "enacted prior to February first, nineteen hundred and eleven."

There has been no creating or changing of judicial circuits or judicial districts, or other repeal of the old court in that district.

The clause in the last paragraph of section 297 of The Judicial Code: "Also all *other* acts and parts of acts, in so far as they are embraced within and superseded by this act, are hereby repealed," must be construed with section 294. That is to say *other* acts *embraced within and superseded by* this act. The District Court was continued.

Furthermore, the contempt proceeding was begun July 9, 1909, and was pending at the time The Judicial Code went into effect and may be prosecuted with the same effect as if no repeal or amendment had been made. (Sec. 299.)

The case cited in vol. X, Ency. of Plead. & Prac., p. 1099, to uphold the rule that the Court which issued the injunction must inflict the punishment for contempt is *Manderscheid* vs. *District Court,* 69 Iowa, 240. That case holds that it was proper to entitle the contempt matter in the original cause and it would be improper to bring the contempt proceedings before a different court in an independent action.

The case of *Ex parte Bradley,* 7 Wall. 364, is no more in point than the other. The quotation on page 12 of the brief of plaintiffs in error is distorted. In that case there was no change in the law pending the proceeding for contempt. The change of law took place in 1863, the alleged contempt in 1867. The legislation was reviewed to show that there were two separate courts—the criminal and the supreme—existing at one and the same time, and then held that the supreme court could not punish for contempt committed in the criminal court.

The case of *Kirk* vs. *Milwaukee,* 26 Fed. 501, as already shown, has been overruled as to civil contempts.

On pages 506 and 507 this very case argues that contempt proceedings will lie in the Federal Court on removal from a State Court, for contempt committed in the State Court, where it necessarily involves the enforcement of a civil remedy and not a purely criminal contempt.

The Judicial Code (sec. 299) clearly holds the repeal in abeyance as to all laws which would affect the pending proceedings in this case.

4. The contention that section 11 of the Bankruptcy

Act is the only authority for the injunctions has been fully answered in paragraph II, *supra.*

5. The act of bankruptcy is the application to the State Court for a receiver, and it does not depend upon the failure of the applicant to state facts in his application sufficient to give that Court jurisdiction. (Trans., pp. 135, 136.) Hobbs was never made a party to, nor did he appear in, the State Court proceeding. The argument is that because they were all conspiring together to defraud their creditors, therefore the State Court had jurisdiction, although they did not plead necessary facts. (Brief plaintiff in error, pp. 15, 16.)

6. Contempt proceedings are *sui generis.* It is criminal in its nature, in that the party is charged with doing something forbidden, and, if found guilty, is punished. Yet it may be resorted to in civil as well as criminal actions, and also independently of any civil or criminal action.

> *Bessette* vs. *Conkey Co.,* 194 U. S. 324, 39 Law Ed. 1092.

The pleadings were sufficient—paragraphs II, XV. The Bankruptcy Act gives jurisdiction and there is here no question of a suit in equity where there was a plain, speedy and adequate remedy at law. Paragraph II, *supra.*

7. In paragraph IV of their brief plaintiffs in error attempt to attack the sufficiency of the petitions for the injunctions, because of the form of verification of the petitions for the injunctions.

The verification is at best a matter of form only, and may be amended on demurrer.

In re Gift, 130 Fed. 230.

The Court having power to issue the injunction, a man who is enjoined and violates the injunction cannot escape punishment by alleging that the bill was demurrable.

U. S. vs. *Agler,* 62 Fed. 824, 826.

"With whatever irregularities the proceedings may be affected, or however erroneously the court may have acted in granting the injunction in the first instance, it must be implicitly obeyed so long as it remains in existence, and the fact that it has been granted erroneously affords no justification or excuse for its violation before it has been properly dissolved. And the party against whom an injunction issues will not be allowed to violate it on the ground of want of equity in the bill, since he is not at liberty to speculate upon the intention or decision of the court, or upon the equity of the bill, or to question the authority of the court to grant relief upon the facts stated, except upon application to dissolve the injunction. . . . And upon proceedings for contempt in this class of cases the only legitimate inquiry is whether the court granting the injunction had jurisdiction of the parties and of the subject matter, and whether it made the order which has been violated, and the court will not in such proceedings consider whether the order was erroneous.

High on Injunctions, (4th ed.), sec. 1416;
Rogers vs. *Pitt,* 89 Fed. 424.
See also par. VIII, *supra.*

The cases cited by plaintiffs in error are not in point.

In *In re Vastbinder,* 126 Fed. 417, a special demurrer to a petition in bankruptcy was sustained.

High on Injunctions, section 1567, (4th ed.), holds that in case of an injunction in and of a creditor's bill it is sufficient if complainant swears upon information and belief. What is there said with reference to a direct attack on the pleading is not applicable in contempt as shown by section 1416 by the same author.

Campbell vs. *Morrison,* 7 Paige, 157, was a case of dissolving an injunction, not contempt, and holds that, under some circumstances, an affidavit on information and belief is sufficient, and the verification in the case at bar shows the absence of the petitioning creditors from the State.

In view of the statement on page 2 that there was no controversy in the State Court among the parties seeking its jurisdiction, the language used with reference to being "between two fires" is without merit. An application to the State Court by common consent would have been sufficient. There was no order of the State Court making it obligatory upon them to take the money and consequently they were not between two fires.

8. In further answer to paragraph V of the brief of plaintiffs in error it may be said the pleadings and proof are sufficient. (Trans., pp. 137-149.) The proceedings had, admissions made and evidence submitted September 18, 1908, at 10 o'clock is not before the Court now. The cases cited on page 29 of said paragraph are governed by state statutes and are not in point. The injunction, although merely temporary, continues until vacated by the Court.

Loveland on Bankruptcy (3rd ed.), p. 257.

In *Houghton* vs. *Courtelyou,* 208 U. S. 149, the temporary restraining order was superseded by a permanent injunction and by the terms of the former it terminated. The case here is otherwise.

9. It would seem self-evident that the violation of a temporary injunction, valid in every particular, cannot be justified because the remedy is not applied until after final judgment in the main cause. The case of *Houghton* vs. *Meyer,* 208 U. S. 149, cited by the other side, is conclusive. There is no question of repeal, but only the violation of a lawful order, which still stands and is effective as to all acts during that time.

10. The brief of defendants in the trial Court is fully answered by the opinion of the Court. (Trans., p. 123 *et seq.*)

11. On page 2 of the brief of plaintiffs in error they admit that the parties in contempt were all acting together; the Court found that they were allies and confederates in a fraudulent scheme (Trans., pp. 93, 94 and 95); and the State Court never had jurisdiction. (Trans., p. 137.) Wylie's possession was not adverse to the bankrupt. The cases cited on page 63 of the brief of plaintiffs in error are, therefore, not in point. *In re Wells,* 114 Fed. 222, 224, expressly holds that where property passed into the hands of a party as agent of the bankrupt, the Federal District Court could by orders and contempt proceedings coerce the surrender of such property to the trustee in bankruptcy.

> "The moment a petition in bankruptcy" (involuntary) "is filed the jurisdiction of the bankruptcy

court begins. *It has the effect both of an attachment and an injunction,* and the adjudication of bankruptcy discharges any attachment levied within four months prior to the filing of the petition, unless the bankruptcy court shall order the lien preserved for the benefit of the bankrupt's estate, and *it operates as a seizure of the property,* the title to which subsequently passes to the trustee."

Staunton vs. *Wooden,* (C. C. A., 9th Cir.), 179 Fed. 61, 62.

The Court certainly had the power and jurisdiction to make any order in support of such attachment, injunction and seizure. If a person may sweep aside this ample power by the array of technicalities here presented the bankruptcy court is powerless and inefficient. The plaintiffs in error herein participated in a scheme to defraud, whereby they wasted the bankrupt's estate, obtained and seek to appropriate large sums of money. The Court has ordered them to restore it. Every consideration of justice and good conscience, it seems to the defendants in error, demands that the order of the bankruptcy court be upheld, and they confidently expect this Court to so hold.

Respectfully submitted.

Joseph Kirk

J. L. Kennedy

Attorneys and Solicitors for Defendants in Error.

No. 2153

IN THE 2153

United States Circuit Court of Appeals

NINTH CIRCUIT

OREGON COAL & NAVIGATION CO.,

Appellant,

vs.

E. A. ANDERSON and R. B. HERRON,

Appellees.

Upon Appeal from the United States District Court, District of Oregon.

TRANSCRIPT OF RECORD.

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IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

OREGON COAL & NAVIGATION CO.,

Appellant,

vs.

E. A. ANDERSON and R. B. HERRON,

Appellees.

Names and Addresses of Attorneys upon this Appeal:

For the Appellant:

J. LeRoy Smith, Yeon Bldg., Portland, Or.

J. M. Upton, Marshfield, Oregon.

For the Appellees:

Jno. F. Hall, Marshfield, Oregon.

A. S. Hammond, Marshfield, Oregon.

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[Order Enlarging Time to File Record.]

Order Extending Time.

January 27, 1912.

In the District Court of the United States for the District of Oregon.

OREGON COAL AND NAVIGATION COMPANY,

Appellant,

vs.

E. A. ANDERSON AND R. B. HERRON,

Appellees.

Now, at this time, for good cause shown, it is or-ordered that defendant's time for filing the transcript and docketing this cause in the United States Circuit Court of Appeals, Ninth Circuit, be, and the same is hereby, enlarged and extended to and including the 26 day if February, 1912.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: Filed Jan. 27, 1912, A. M. Cannon, Clerk.

..[Order Enlarging Time to File Record.]

In the District Court of the United States for the District of Oregon.

Order Extending Time.

February, 9, 1912.

E. A. ANDERSON AND R. B. HERRON,

Complainant,

vs.

OREGON COAL AND NAVIGATION COMPANY,

Defendant.

Now, at this time, for good cause shown, it is ordered that defendant's time for filing the transcript and docketing this cause in the United States Circuit Court of Appeals, Ninth Circuit, be, and the same is hereby, enlarged and extended to and including the 15 day of April, 1912.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: Filed: Feb. 9, 1912, A. M. Cannon, Clerk.

[Order Enlarging Time to File Record.]

In the District Court of the United States for the District of Oregon.

Order Extending Time.

April 3, 1912.

E. A. ANDERSON AND R. B. HERRON,

Complainant,

vs.

OREGON COAL AND NAVIGATION COMPANY,

Defendant.

Now, at this time, for good cause shown, it is ordered that defendant's time for filing the transcript and docketing this cause in the United States Circuit Court of Appeals, Ninth Circuit, be, and the same is hereby, enlarged and extended to and including the 15th day of June, 1912.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: Filed Apr. 3, 1912, A. M. Cannon, Clerk.

In the District Court of the United States for the District of Oregon.

April Term 1907.

Be it remembered, that on the 4th day of October, 1907, there was duly filed in the Circuit Court of the United States for the District of Oregon, a transcript of record on removal from the Circuit Court of the State of Oregon for Coos County, in words and figures as follows, to-wit:

[Stipulation.]

In the Circuit Court of the State of Oregon for Coos County.

Suit in Equity for an Injunction.

Complaint.

E. A. ANDERSON, R. B. HERRON,
Plaintiff's,

vs.

OREGON COAL AND NAVIGATION COMPANY, F. S. DOW, PATRICK HENNESY,
Defendants.

Whereas, it appearing that the original complaint in this suit has been lost, and after diligent search cannot be found, now therefore

It is hereby stipulated and agreed by and between the parties to this suit, by their respective attorneys, that the copy of said complaint hereto attached shall be and hereby is substituted for the original complaint heretofore filed herein, and that the same be

filed by the Clerk of this Court and made a part of the record of said suit.

JOHN, F. HALL,
JAMES T. HALL,
A. S. HAMMOND,
Attorneys for Plaintiffs.

J. M. UPTON,
E. L. C. FARRIN,
Attorneys for Defendants.

[Complaint.]

In the Circuit Court of the State of Oregon for Coos County.

Suit in equity for an injunction.

Complaint.

E. A. ANDERSON, R. B. HERRON,
Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION COMPANY, F. S. DOW, PATRICK HENNESY,
Defendants.

Come now the plaintiffs and for cause of complaint against the defendants allege:

I.

That the plaintiff, E. A. Anderson, at all times herein mentioned was, and now is, the owner in fee of Lot 16 in Block 65 in Nasburg's Addition (Replatted as Bennett's Addition) to the town of Marshfield,

Coos County, Oregon, as the same is shown upon the plat of said addition as recorded in the office of the County Clerk of said County, in Book 2 of Plats, Page 110, and in Book 3 of Plats, Page 51 of the records of said county.

And the plaintiff, R. B. Herron, is, and at all times herein mentioned, was, the owner in fee of Lot 17 in Block 65 in said addition as the same is shown on said recorded plat.

II.

That said lots are bounded on their Easterly and Northerly side by the low water mark of Coos Bay which is a navigable body of water wherein the tide ebbs and flows and the plaintiffs as owners of said lots, also own, as appurtenant thereto, the right and privilege to build docks or wharves out into the water of Coos Bay to the edge of navigable water; and the principal value of said lots arises from the facts that the owners of said lots have such right and privilege and without said right and privilege said lots would be comparatively worthless.

III.

That the defendant, the Oregon Coal and Navigation Company, is a corporation organized and existing under and by virtue of the laws of the State of California and the defendants F. S. Dow and Patrick Hennesy are its agents in Oregon, residing in Coos County.

IV.

That the defendant, the Oregon Coal and Navigation Company, by its said agents and its employees,

without any right, permission or authority so to do, did, on or about the of March, 1907, secretly, surreptitiously and in the night time, go upon the submerged lands lying between plaintiffs' said lots and the navigable water of Coos Bay and drive therein and thereon numerous piles and posts, which are firmly imbedded in the soil and extend and protrude above the waters of said Coos Bay a distance of from 6 to 12 feet, thus entirely shutting off the plaintiffs from all access to the ship canal and the navigable waters of said Coos Bay:

And the defendants threaten and give forth that they will continue to so drive piles and posts in front of plaintiffs' said lots and that they will place timbers and planks thereon and that they will erect structures thereon that will completely cut off the plaintiffs from and prevent all access to the ship canal and the navigable waters of Coos Bay:

And the plaintiffs believe and so believing allege, that unless prevented by the order of this Court the defendants will so do and plaintiffs allege that such acts will cause great and irreparable damage and injury to plaintiffs and that the amount or extent of such injury could not be measured or ascertained.

V.

That the plaintiffs have no plain, speedy or adequate remedy at law, wherefore plaintiffs pray:

First: For an order of this Court, or Judge thereof, restraining the defendants and their agents, servants and employees from driving any piles or posts or

erecting any structure in front of said described lots or in any way obstructing, occupying or encroaching upon the space between said lots and the ship canal on the navigable waters of Coos Bay; such order to remain in force until the final determination of this.

Second: That upon the final hearing of this cause such order be made perpetual and it be further ordered that the defendants remove all piles or posts so driven by them in front of plaintiffs' property.

Third: That plaintiffs have judgment against the defendants for the cost and disbursement herein.

Fourth: For such other and further relief as to the Court may appear proper.

JOHN F. HALL,
JAMES T. HALL,
A. S. HAMMOND,
Attorneys for Plaintiffs.

State of Oregon,
County of Coos,—ss.

I, E. A. Anderson, being first duly sworn, on oath say, I am one of the plaintiffs in the above entitled suit; I have read the foregoing complaint and the allegations thereof are true.

E. A. ANDERSON,

Subscribed and sworn to before me this 25 day of March, 1907.

[Notarial Seal] MAY R. STAUFF,

State of Oregon,
County of Coos,—ss.

I, A. S. Hammond, one of the attorneys for plaintiffs herein, do hereby certify that the foregoing is a

full, true and correct copy of the original complaint herein and of the whole thereof.

A. S. HAMMOND.

Dated March, 1907.

[Endorsed] No. 2422. In the Circuit Court of the State of Oregon for Coos County. E. A. Anderson, R. B. Herron, plaintiffs, vs. The Oregon Coal and Navigation Company, et al, defendants. Copy complaint, filed Sep. 27, 1907. James Watson, County Clerk. Hall & Hall, A. S. Hammond, attorneys for plaintiffs.

[Undertaking for Injunction.]

In the Circuit Court of the State of Oregon, in and for the County of Coos.

E. A. ANDERSON, R. B. HERRON,

Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION COMPANY, F. S. DOW and PATRICK HENNESY,

Defendants.

Whereas, the above named plaintiffs are about to bring a suit in the Circuit Court of the State of Oregon in and for the County of Coos, against the above named defendants, and are about to apply for an injunction in said suit against the defendants enjoining and restraining them from the commission of certain acts as in complaint in this suit are more particularly set forth and described.

Now Therefore, we the undersigned, E. A. Anderson and R. B. Herron, as principals, and Robert Marsden and Frank Bowron, as sureties, in consideration of the premises and of the issuing of said injunction do jointly and severally undertake and promise: that in case said injunction shall issue, the said plaintiffs will pay all costs and disbursements that may be decreed to the defendants, and such damages not exceeding Five Hundred ($500.00) Dollars as they may sustain by reason of the said injunction, if the same be wrongful or without sufficient cause.

Dated at Marshfield, Coos County, Oregon, this 26th day of March, A. D. 1907.

E. A. ANDERSON, [Seal]
R. B. HERRON, [Seal]
ROBERT MARSDEN, [Seal]
Frank BOWRON, [Seal]

State of Oregon,
County of Coos,—ss.

I, Robert Marsden and Frank Bowron, being duly sworn, say that I am one of the sureties above named; that I am not an officer of any court, and that I am worth the sum of Five Hundred Dollars over and above all just debts, and property exempt from execution.

ROBERT MARSDEN,
FRANK BOWRON.

Subscribed and sworn to before me, this 26th day of March, A. D. 1907.

[Seal] MAY R. STAUFF,
Notary Public for Oregon.

[Endorsed]: No. 2422. Undertaking for Injunction. Filed March 27, 1907. James Watson, Clerk, by Robert W. Watson, Deputy.

[Motion and Affidavits for Injunction.]

In the Circuit Court of the State of Oregon, in and for the County of Coos.

E. A. ANDERSON, R. B. HERRON,

Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION COMPANY, F. S. DOW AND PATRICK HENNESY,

Defendants.

To the Hon. J. W. Hamilton, Judge of the Circuit Court, of the State of Oregon, in and for the County of Coos:

Based upon the complaint herein filed, and the affidavits of E. A. Anderson, R. B. Herron and B. Swanton hereto attached, the plaintiffs by their attorneys moves the Court, for an order of injunction, temporarily enjoining the defendants from the commission of the act, complained of in the complaint, filed herein, to which complaint reference is hereby made as a part of this motion.

That it is necessary that said injunction be granted at once to prevent the said defendants, from the acts complained of in said complaint.

JAMES T. HALL,
JOHN F. HALL,
A. S. HAMMOND,
Attorneys for Plaintiffs.

State of Oregon,
County of Coos,—ss.

I, E. A. Anderson, I, R. B. Herron, being duly sworn, each for himself says that I am one of the plaintiffs above named; that I know the contents of the complaint filed herein; that it is necessary that a temporary injunction be issued in this suit, to prevent the defendants from building a wharf and warehouse, or some other structure in front of the lots, mentioned in complaint; that the said defendants have driven piles in the water of Coos Bay, in front of said lots, and threatened to build a wharf thereon, and if not prevented by an order of this Court will construct a wharf, build a ware-house in front of said lots, and do irreparable injury to these plaintiffs, and cut them off from the navigable waters of Coos Bay; that without the right and privilege of wharfing out to the navigable waters of Coos Bay, said lots are comparatively worthless.

The relative position of said lots to the property of the defendants and to Coos Bay is shown by the plat annexed hereto, and marked exhibit "A", and to which exhibit reference is hereby made.

E. A. ANDERSON.
R. B. HERRON.

Subscribed and sworn to before me, this 26th day of March, A. D. 1907.

[Seal] MAY R. STAUFF,
Notary Public for Oregon.

State of Oregon,
County of Coos,—ss.

I, B. Swanton, being first duly sworn, say that I am well acquainted with the location of Lots Sixteen and Seventeen (16 and 17) Block Sixty-Five, (65) Nasburg's Addition to Marshfield, (re-platted as Bennett's Addition) that the proposed wharf and piles driven by the Oregon Coal and Navigation Company is in front of said lots, and cuts the said lots off from Coos Bay.

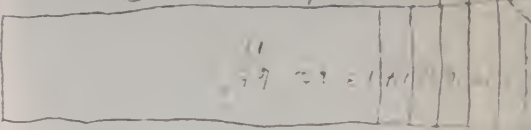
B. SWANTON.

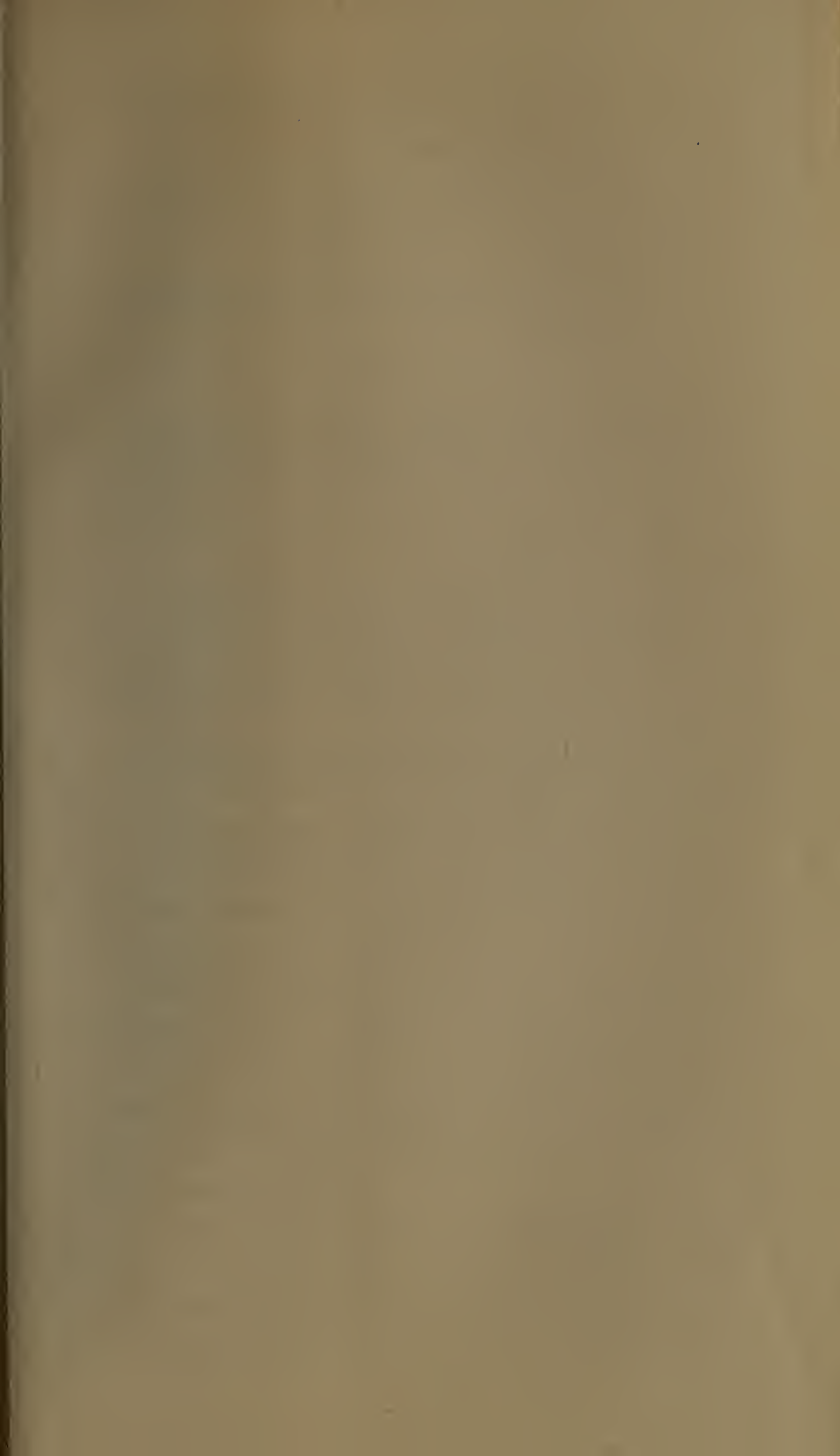
Subscribed and sworn to before me this 26 day of March, 1907.

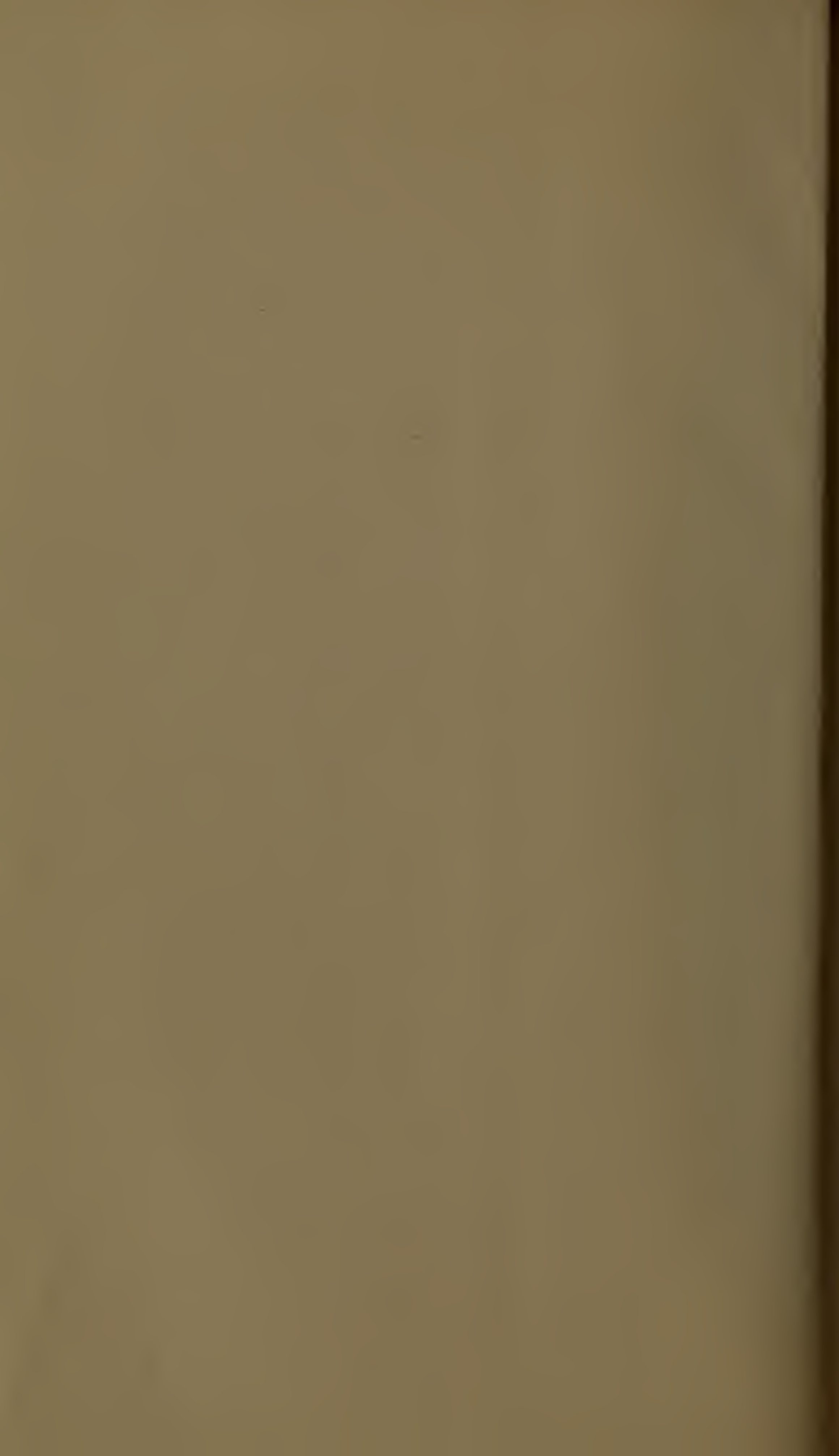
[Seal] MAY R. STAUFF.
Notary Public for Oregon.

[Endorsed]: No. 2422. Motion and Affidavits for Injunction. Filed March 27, 1907, James Watson, Clerk, by Robert W. Watson, Deputy.

Exhibit "A."







[Order of Injunction.]

In the Circuit Court of the State of Oregon, in and for the County of Coos.

E. A. ANDERSON, R. B. HERRON,

Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION COMPANY, F. S. DOW and PATRICK HENNESY,

Defendants.

To THE OREGON COAL AND NAVIGATION COMPANY, F. S. DOW and PATRICK HENNESY, the above named defendants:

The above named plaintiff having filed their complaint in the Circuit Court of the State of Oregon, for the County of Coos, against the above named defenadnts, praying for an injunction requiring them to refrain from certain acts in complaint and hereinafter more particularly mentioned.

On reading the complaint in this suit duly verified and affidavits filed in support of motion for injunction, it satisfactorily appearing to me therefrom, that it is a proper case for an injunction; and that sufficient grounds exists therefor; and that the necessary undertaking has been given,

It is therefore ordered that you—The Oregon Coal and Navigation Company, F. S. Dow and Patrick Hennesy, and all your servants, employees and agents, and all others acting in aid and assistance for you

and each of you, do absolutely desist and refrain from driving any piles or posts, or erecting any structure in front of Lots Sixteen and Seventeen (16 and 17) in Block Sixty-Five (65) in Nasburg's Addition, (re-platted as Bennett's Addition) to the Town of Marsh-field, County of Coos and State of Oregon, as the same is shown, upon the plat of said addition, as re-corded in the office of the County Clerk of said County, in Book Two (2) of Plats, page One Hundred and Ten (110), and in Book Three (3) of Plats, page Fifty-One (51) of the records of said county, or in any way obstructing, occupying or encroaching upon the space between said lots and the ship channel on the navigable waters of Coos Bay during the pendency of this suit.

Dated at Chambers at Roseburg, Oregon, this 29th day of March, A. D. 1907.

J. W. HAMILTON,
Judge.

It is further ordered that this injunction be served by the Sheriff of Coos County, Oregon; that he make due return of said service in the manner provided by law.

Dated at Chambers at Roseburg, Oregon, this 29th day of March, A. D. 1907.

J. W. HAMILTON,
Judge.

[Endorsed]: No. 2422. Order of Injunction. Filed Apr. 1, 1907, James Watson, Clerk, by John

F. Hall, James T. Hall, and A. S. Hammond, Attorneys for Plaintiffs.

And afterwards, on the 20 day of April, 1907, the following Sheriff's Return was attached to the Order of Injunction:

In the Circuit Court of the State of Oregon, in and for the County of Coos.

State of Oregon,
County of Coos,—ss.

I, W, W, Gage, Sheriff of the County of Coos, and State of Oregon, do hereby certify that I served the within Writ (Order) of Injunction, within the County of Coos and State of Oregon, on the 4 day of April, 1907, upon defendant F. S. Dow; by delivering to the said defendant in person and personally, at his office in Marshfield, State of Oregon, a copy thereof, prepared and certified to be such copy by James Watson, Clerk of the Circuit Court of the State of Oregon, in and for the County of Coos; that I served the said Writ (Order) of Injunction on the 5 day of April, 1907, in the County of Coos and the State of Oregon, on the defendant "Oregon Coal and Navigation Company" at its office or principal place of business, at New Port, Coos County, Oregon, by delivering to E. E. Morton, agent and clerk of said defendant, whom I found in charge of said office (there being no president, or other head of the defendant, (corporation) secretary, cashier or managing agent, within the County of Coos and State of Oregon upon whom ser-

vice could be made at that time), for and in behalf of said defendants, a copy thereof, prepared and certified to be such copy by James Watson, Clerk of the County of Coos and State of Oregon. I further certify, that I served the within Writ (Order) of Injunction on the defendant Patrick Hennesy, on the 17th day of April, 1907, in the County of Coos and State of Oregon, by delivering to the said Patrick Hennesy, in person and personally, a copy thereof, prepared and certified to by me, as Sheriff; and I further certify that I served the said Writ (Order) of Injunction, within the County of Coos and State of Oregon, on the 17th day of April, 1907, on the defendant Oregon Coal and Navigation Company, at its principal place of business, at New Port, Coos County, Oregon, by delivering to Pat Hennesy, its superintendent and managing agent, personally and in person, for and on behalf of said defendant "Oregon Coal and Navigation Company," a copy thereof, duly certified by me, to be such copy, informing the said Pat Hennesy, that said service was made upon him, as managing agent and superintendent of the defendant "Oregon Coal and Navigation Company," as service on said defendant.

W. W. GAGE,
Sheriff of Coos County, State of Oregon.

In the Circuit Court of the State of Oregon, in and for the County of Coos.

E. A. ANDERSON AND R. B. HERRON,
Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION COMPANY, F. S. DOW AND PATRICK HENNESY,

Defendants.

Now at this time come the defendants above named, by J. M. Upton their attorney, appearing specially for the purpose of excepting to the jurisdiction of the Court over the persons of the said defendants, and for no other purpose, and move the Court for an order thereof quashing the summons herein, for the reason that no summons have been served upon the said defendants or upon either of them.

J. M. UPTON,
Attorney for Defendants.

[Endorsed]: No. 2422. Motion to quash summons. Filed April 10, 1907. James Watson, Clerk, by Robt. W. Watson, Deputy.

In the Circuit Court of the State of Oregon, in and for the County of Coos.

E. A. ANDERSON, R. B. HERRON,

Plaintiffs,

vs.

OREGON COAL AND NAVIGATION COMPANY, F. S. DOW, AND PATRICK HENNESY,

Defendants.

Comes now the plaintiffs and moves the Court for an order permitting the Sheriff of Coos county, Oregon, to attach his returns on the service of the injunc-

tion order of the above entitled cause to the original order of injunction. The original order having been filed without the Sheriff's return.

JOHN F. HALL.
JAMES T. HALL.
A. S. HAMMOND.
Attorneys for Plaintiffs.

[Endorsed]: Motion. Filed April 19, 1907. James Watson, Clerk.

[Summons.]

In the Circuit Court of the State of Oregon for Coos County.

E. A. ANDERSON AND R. B. HERRON,
Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION COMPANY, F. S. DOW, PATRICK HENNESY,
Defendants.

To the OREGON COAL AND NAVIGATION COMPANY, F. S. DOW, PATRICK HENNESY, the Above Named Defendants:

In the name of the State of Oregon: You are hereby required to appear and answer the complaint filed against you you in the above entitled suit within ten days from the date of the service of this summons upon you, if served within this County, or if served within any other county of this state, then within twenty days from the date of the service of this summons

upon you; and if you fail so to answer for want thereof, the plaintiff will apply to the Court for the relief demanded therein.

JOHN F. HALL,
JAMES T. HALL,
A. S. HAMMOND,
Attorneys for the Plaintiffs.

To the Sheriff of Coos County, State of Oregon:

You are hereby directed to serve only one copy of the complaint in the within entitled suit, and that copy to be served upon the defendant Patrick Hennesy; the other defendants to be served with a copy of summons only.

JOHN F. HALL,
JAMES T. HALL,
A. S. HAMMOND,
Attorneys for Plaintiffs.

Attached to it was a return as follows:

State of Oregon,
County of Coos,—ss.

I, W. W. Gage, Sheriff of the County of Coos and State of Oregon, do hereby certify, that I served the within summons, within the said County of Coos and State of Oregon, on the 4th day of April, 1907, on the within named defendant—F. S. Dow, by delivering a copy thereof prepared and certified to by me as Sheriff, to the said defendant F. S. Dow, in person and personally; that I served the within summons,

within the State of Oregon and County of Coos on the 5th day of April, 1907, upon the defendant "The Oregon Coal and Navigation Company" at its office and principal place of business, at the New Port Coal Mine in Coos County, State of Oregon, by delivering to A. E. Morton, the clerk and agent of said defendant, for and on behalf of said defendants, whom I found in charge of the said office. There being no president or other head of defendant (Corporation) secretary, cashier or managing agent within the County of Coos and State of Oregon, upon whom service could be made at the time; that I further served said summons on the said defendant, "The Oregon Coal and Navigation Company" on the 17th day of April, 1907, within the County of Coos and State of Oregon, by delivering to Patrick Hennesy, Superintendent and Managing Agent of said defendant at the residence of the said defendant at New Port, Coos County, State of Oregon, for and on behalf of said defendant, a copy thereof, prepared and certified by me, as sheriff, there being no president or head of the defendant (Corporation) secretary or cashier, within the County of Coos and State of Oregon upon whom service could be made.

I further certify, that I served the within summons, within the County of Coos and State of Oregon on the 17th day of April, 1907, on the within named defendant Patrick Hennesy by delivering a copy thereof, prepared and certified by me, as Sheriff, together with a copy of the complaint in this suit, prepared and certified to by John F. Hall, one of the attorneys for

the plaintiffs to said Patrick Hennesy in person and personally.

W. W. GAGE,
Sheriff of Coos County, Oregon.

[Endorsed]: No. 2422. Summons. Filed April 20, A. D. 1907, James Watson, Clerk.

[Order.]

E. A. ANDERSON, R. B. HERRON,
Plaintiffs,
vs.
OREGON COAL AND NAVIGATION COMPANY, F. S. DOW AND PATRICK HENNESY,
Defendants.

On the motion of plaintiffs, it is hereby ordered that W. W. Gage, Sheriff of Coos County, Oregon, be, and he is hereby, permitted to attach a return of service of the order of injunctin to the original order, the said original order having been filed without a return.

(Journal Signed) J. W. HAMILTON,
Judge.

[Copy of Order of Injunction and Sheriff's Return.]

In the Circuit Court of the State of Oregon, in and for the County of Coos.

E. A. ANDERSON, R. B. HERRON,
Plaintiffs.
vs.
THE OREGON COAL AND NAVIGATION COMPANY, F. S. DOW AND PATRICK HENNESY,
Defendants.

To the OREGON COAL AND NAVIGATION COMPANY, F. S. DOW and PATRICK the Above Named Defendants:

The above named plaintiffs having filed their complaint in the Circuit Court of the State of Oregon, for the County of Coos, against the above named defendants, praying for an injunction requiring them to refrain from certain acts in the complaint and hereinafter more particularly mentioned.

On reading the complaint in this suit duly verified and affidavits filed in support of motion for injunction, it satisfactorily appearing to me therefrom, that it is a proper case for an injunction; and that sufficient grounds exist therefor; and that the necessary undertaking has been given.

It is therefore ordered that you—The Oregon Coal and Navigation Company, F. S. Dow and Patrick Hennesy, and all your servants, employees and agents, and all others acting in aid and assistance for you and each of you, do absolutely desist and refrain from driving any piles or posts, or erecting any structure in fornt of Lots Sixteen and Seventeen (16 and 17) in Block Sixty-Five in Nasburg's Addition, (Replatted as Bennett's Addition) to the Town of Marshfield, County of Coos and State of Oregon, as the same is shown upon the plat of said addition, as recorded in the office of the County Clerk of said County, in Book Two (2) of Plats, Page One Hundred and Ten (110), in Book Three (3) of Plats, Page Fifty-One (51) of the records of said county, or in any way obstructing, occupying or encroaching upon the space

between said lots and the ship channel on the navigable waters of Coos Bay during the pendency of this suit.

Dated at Chambers at Roseburg, Oregon, this 29th day of March, A. D. 1907.

(Order Signed) J. W. HAMILTON,
Judge.

It is further ordered that this injunction be served by the Sheriff of Coos County, Oregon; that he make due return of said service in the manner provided by law.

Dated at Chambers at Roseburg, Oregon, this 29th day of March, A. D. 1907.

(Order signed) J. W. HAMILTON,
Judge.

State of Oregon,

County of Coos,—ss.

I, James Watson, County Clerk, ex-officio Clerk of the Circuit Court of the State of Oregon for Coos County, custodian of the records of said court, do hereby certify that the foregoing transcript of the order of injunction in the foregoing entitled suit has been by me compared with the original order of injunction as the same appears of record in Vol. 11, page 405, thereof, and that the same is a true and correct copy of such original record of such order and the whole thereof.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Circuit Court for Coos

County, Oregon, this 2nd day of April, A. D. 1907.

(Seal) JAMES WATSON,
Clerk.

Upon which order of injunction appears the following Sheriff's Returns.

State of Oregon,
County of Coos,—ss.

I, W. W. Gage, Sheriff of the County of Coos and State of Oregon, do hereby certify that I served the within Writ (order) of Injunction, within the County of Coos and the State of Oregon, on the 4th day of April, 1907, on the within named defendants, F. S. Dow, and "Oregon Coal and Navigation Company," by delivering to the said defendant F. S. Dow, a copy thereof, duly prepared and certified to be such copy by James Watson, County Clerk of Coos County, Oregon, personally and in person on the 5 day of April, 1907, and by delivering to A. E. Morton, agent and clerk of the defendant "Oregon Coal and Navigation," at the office of said defendant, at New Port, Coos County, State of Oregon, for and in behalf of defendant, "Oregon Coal and Navigation," a copy thereof, duly prepared and certified to be such copy by James Watson, County Clerk of Coos and State of Oregon.

W. W. GAGE,
Sheriff of Coos County, State of Oregon.

[Endorsed]: No. 2422. Sheriff's return. Filed April 20, 1907, James Watson, Clerk.

[Order.]

E. A. ANDERSON, R. B. HERRON,

vs.

OREGON COAL AND NAVIGATION COMPANY, F. S. DOW AND PATRICK HENNESY.

The above entitled cause coming on to be heard on motion of defendants to quash service of summons. The plaintiffs appear by John F. Hall, James T. Hall and A. S. Hammond, their attorneys, and the defendants appeared by J. M. Upton and E. L. C. Farrin, their attorneys. The court after hearing the argument of counsel finds that said motion should be and the same is hereby overruled.

(Journal Signed) J. W. HAMILTON,
Judge.

[Appearance.]

In the Circuit Court of the State of Oregon for Coos County.

E. A. ANDERSON and R. B. HERRON,
Plaintiffs,

vs.

The OREGON COAL AND NAVIGATION COMPANY, F. S. DOW and PATRICK HENNESY,
Defendants.

Now comes Oregon Coal and Navigation Company, one of the above named defendants, and enters and files its appearance in the above entitled action

and herewith also files its petition for the removal of said cause and suit into the Circuit Court of the United States in and for the District of Oregon.

OREGON COAL AND NAVIGATION COMPANY,

By Patrick Hennesy, its General Manager in and for the State of Oregon.

J. M. UPTON, E. L. C. FARRIN,

Attorneys for said defendant Oregon Coal and Navigation Company.

[Endorsed]: No. 2422. Appearance. Filed April 27, 1907. James Watson, Clerk.

[Petition for Removal.]

In the Circuit Court of the State of Oregon for Coos County.

E. A. ANDERSON and R. B. HERRON,

Plaintiffs,

vs.

The OREGON COAL AND NAVIGATION COMPANY, F. S. DOW, and PATRICK HENNESY,

Defendants.

Suit in equity for an injunction. Petition.

To the HONORABLE the CIRCUIT COURT of the STATE O FOREGON for the COUNTY of COOS:

Your petitioner, The Oregon Coal and Navigation Company, respectfully shows:

1. That your petitioner is a party to the above entitled suit, which said suit, as appears from the

complaint on file herein, is of a civil nature, brought in the above entitled court, in which the said plaintiffs seek by writ of injunction to enjoin the said defendants from driving any piles or posts or erecting any structures in front of the lots numbered seventeen and eighteen, in the block numbered sixty-five, of Nasburg's Addition (Replatted as Bennett's Addition) to the Town of Marshfield, Coos County, Oregon, as the same is shown upon the plat of said addition as recorded in the office of the County Clerk of the said County of Coos, and that heretofore temporary injunction was issued out of the above entitled court and cause restraining the above named defendants from driving said piles or posts or erecting any structure in front of said above described lots, and that said defendants have desisted and still desist from further proceeding in the matter;

2. That in said complaint the said plaintiffs claim and allege that as owners of the lots above described, as an appurtenant thereto, they have the right and privilege to build docks or wharves out into the waters of Coos Bay to the edge of navigable water;

3. That your petitioner is the owner of all of the lands fronting and abutting upon the premises last above described;

4. That the lands so fronting and abutting upon said lots above described are tide lands and are valuable chiefly for the purpose of maintaining thereon wharves and docks;

5. That the matter and amount involved or in dispute in the above entitled suit, exclusive of interest and costs, exceeds the sum or value of two thousand dollars, to-wit: the sum of five thousand dollars;

6. That the above entitled suit is now pending in the Circuit Court of the State of Oregon for the County of Coos, and no proceedings have been taken by your petitioner therein, other than the entering and filing of its appearance in said suit with this petition and its bond for removal of said cause;

7. That at the time of the commencement of said suit your petitioner, The Oregon Coal and Navigation Company, was, and ever since has been and still is a corporation, duly incorporated, created and existing under and by virtue of the laws of the State of California, and is a citizen and resident of said State of California, and is a non-resident of the State of Oregon, and has no other residence than that in the State of California;

8. That at the time of the commencement of said suit, the plaintiffs therein, E. A. Anderson and R. B. Herron, were and ever since have been and now are citizens and residents of the State of Oregon;

9. That at the time of the commencement of said suit there was, ever since has been and still is therein a controversy wholly between citizens of different states, and which can be fully determined as between them, that is to say as between this petitioner, The Oregon Coal and Navigation Company, a citizen of

the State of California, on the one side, and the said plaintiffs, E. A. Anderson and R. B. Herron, citizens of the State of Oregon, on the other side; that the defendants, F. S. Dow and Patrick Hennesy, have no interest in said suit or controversy, or the result thereof, and are not necessary, indispensable or proper parties thereto;

10. That service of process herein was made as against this petitioner, The Oregon Coal and Navigation Company, upon Patrick Hennesy, the general manager of said petitioner in and for the State of Oregon, and no other process was served on this petitioner in said suit or proceeding; that petitioner at the time of the service of said process was not, and is not required by the laws of the State of Oregon or the rules of the above entitled Circuit Court of the State of Oregon for the County of Coos, to answer or plead to the complaint in said action until a day subsequent to the filing of this petition by petitioner;

11. That your petitioner files and offers herewith its bond with good and sufficient sureties in the penal sum of Three Thousand Dollars for its entering in said Circuit Court of the United States for the District of Oregon, on the first day of its next session, a copy of the record in the said action, and for the paying of all costs that may be awarded by the said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays this Honorable

Court to accept said bond as sufficient and to make its order for the removal of said cause to the Circuit Court of the United States, in and for the District of Oregon, pursuant to the Act of Congress in such cases made and provided, and for such other and further order as may be proper, and to cause the record herein to be removed to said Circuit Court of the United States, and that no other or further proceedings be had in said Circuit Court of the State of Oregon for the County of Coos, or that such other order may be made as may be proper.

Dated April 27th, 1907.

THE OREGON COAL AND NAVIGATION COMPANY,

By PATRICK HENNESY,

Its General Manager in and for the State of Oregon.

J. M. UPTON,

E. L. C. FARRIN,

Attorneys for Petitioner.

State of Oregon,
County of Coos,—ss.

Patrick Hennesy, being first duly sworn, on oath says: that he is the General Manager in and for the State of Oregon, of the Oregon Coal and Navigation Company, a corporation, the petitioner named in the foregoing petition; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and that as to those matters he believes it

to be true; that all of the material allegations in said petition are within his own personal knowledge.

PATRICK HENNESY,

Subscribed and sworn to before me this 25th day of April, 1907, at Coos County, Oregon.

[Seal] JAMES WATSON,
Clerk.

[Endorsed]: No. 2422. Petition for Removal. Filed April 27, 1906, James Watson, Clerk.

And afterwards, on the 27th day of April, 1907, there was filed in the office of the said clerk, a bond, in words and figures, following, to-wit:

In the Circuit Court of the State of Oregon for Coos County.

E. A. ANDERSON AND R. B. HERRON,
Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION COMPANY, F. S. DOW AND PATRICK HENNESY,
Defendants.

Know all men by these presents, that we, The Oregon Coal and Navigation Company, a corporation organized and existing under and by virtue of the laws of the State of California, as principal, and J. W. Bennett as surety, are held and firmly bound unto the above named plaintiffs, in the sum of Three Thousand Dollars, lawful money of the United States of America, for the payment of which, well and truly to

be made to the said obligees, their heirs or assigns, we bind ourselves, our and each of our heirs, administrators, successors and assigns, jointly and severally, firmly by these presents.

Witness our hands and seals this 27th day of April, 1907.

The condition of the foregoing obligation is such, that whereas said Oregon Coal and Navigation Company has petitioned the Circuit Court of the State of Oregon for the County of Coos, for the removal to the Circuit Court of the United States in and for the District of Oregon, of a certain cause, suit or proceeding therein pending, and whereas, E. A. Anderson and R. B. Herron are plaintiffs, and the Oregon Coal and Navigation Company, F. S. Dow and Patrick Hennesy are defendants, and which cause, suit or proceeding is numbered 2422.

Now therefore, if the said Oregon Coal and Navigation Company, said petitioner, shall enter in said Circuit Court of the United States in and for the District of Oregon, on the first day of the next session of said court, a copy of the record in said cause, suit or proceeding, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, or if said court shall hold that said cause, suit or proceeding, was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and effect.

THE OREGON COAL AND NAVIGATION COMPANY,

By PATRICK HENNESY,
Its General Manager in and for the State of Oregon.
J. W. BENNETT.

State of Oregon,
County of Coos,—ss.

I, J. W. Bennett, the surety named in the above bond, being duly sworn say: that I am a freeholder and resident within said state, and Worth the sum of Six Thousand Dollars, over and above all my debts and liabilities, exclusive of property exempt from execution or forced sale.

J. W .BENNETT.

Subscribed and sworn to before me this 27th day of April, 1907, at Coos County, Oregon.

[Seal] JAMES WATSON,
Clerk.

The foregoing bears the following endorsements: No. 2422. In the Circuit Court of the State of Oregon in and for the County of Coos. E. A. Anderson, et al, vs. Oregon Coal & Nav. Co., et al. Bond. Filed April 27th, 1907, James Watson, Clerk. J. M. Upton & E. L. C. Farrin, Attorneys for Defendant.

And afterwards, on the 30 day of April, 1907, it being the 8th day of the April term of said court, the following order of removal was made:

[Order.]

E. A. ANDERSON AND R. B. HERRON,
Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION COMPANY, F. S. DOW AND PATRICK HENNESY,

Defendants.

Upon reading and filing the petition and bond of the defendants, The Oregon Coal and Navigation Company, for the removal of the above entitled suit or proceeding to the United States Circuit Court, in and for the District of Oregon, said bond is hereby approved as good and sufficient, and

It is hereby ordered that the said suit or proceeding be, and the same is hereby removed from the Circuit Court of the State of Oregon in and for the County of Coos, to the Circuit Court of the United States, in and for the District of Oregon.

(Journal Signed) J. W. HAMILTON,

Judge.

In the Circuit Court of the State of Oregon, in and for the County of Coos.

[Clerk's Certificate.]

E. A. ANDERSON, R. B. HERRON,

Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION COMPANY, F. S. DOW AND PATRICK HENNESY,

Defendants.

State of Oregon,
County of Coos,—ss.

I, James Watson, County Clerk, ex-officio clerk of

the Circuit Court of the State of Oregon, in and for the County of Coos, do hereby certify that I have prepared the foregoing Transcript on Removal to the United States Circuit Court for the District of Oregon, from the Circuit of the State of Oregon, in and for the County of Coos, in the above entitled cause and embracing the following papers, to-wit:

Complaint, Undertaking on Injunction, Motion and Affidavits for Injunction, Order of Injunction, Sheriff's Return, Motion to Quash Summons, Motion to Attach Sheriff's Return to Order of Injunction, Summons and Sheriff's Return thereof, Order Allowing Sheriff's Return to be Attached to Order of Injunction, Copy of Order of Injunction and Sheriff's Return, Order Overruling Motion to Quash Summons, Appearance, Petition for Removal, Bond for Removal and Order of Removal; that I have compared the said Transcript with the original papers in the above entitled cause on file in my office, together with all the orders made and entered in said cause on the journals of said court and that the same is true and correct Transcript of said original papers and orders and the whole thereof.

I further certify that on the 27th day of April, A. D. 1907, a good and sufficient Undertaking on Removal of said cause in due form of law, on the said removal herein, was filed in this office in said cause.

Witness my hand and the seal of the said court affixed this 28th day of September, A. D. 1907.

JAMES WATSON,

Clerk.

And afterwards, to wit, on the 19 day of October, 1908, there was duly filed in said court, a demurrer in words and figures as follows, to wit:

[Demurrer.]

In the Circuit Court of the United States for the District of Oregon.

E. A. ANDERSON AND JOHN R. HERRON,
Plaintiffs.

vs.

OREGON COAL AND NAVIGATION COMPANY,
Defendant.

Now comes the above named defendant and demurs to the complaint on file herein for the reason and on the ground that the same does not state facts sufficient to constitute a cause of suit.

J. M. UPTON and
E. L. C. FARRIN,
Attorneys for Defendant.

[Endorsed]: Demurrer. Filed Oct. 19, 1908, G. H. Marsh, Clerk.

And afterwards, to wit, on Thursday, the 21st day of January, 1909, the same being the 92d judicial day of the regular October 1908 term of said court; present: the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

[Order Overruling Demurrer.]

In the Circuit Court of the United States for the District of Oregon.

No. 3196.

January 21, 1909.

E. A. ANDERSON, ET AL,

vs.

THE OREGON COAL AND NAVIGATION COMPANY, ET AL.

This cause was heretofore submitted to the Court upon demurrer to the complaint herein without argument, upon written briefs filed by the respective parties hereto; Whereupon, the Court being fully advised in the premises, It is Ordered and Adjudged that said demurrer be, and the same is hereby, overruled; and that the defendant be, and he is hereby, allowed ten days from this date within which to file an answer herein.

And afterwards, to wit, on the 3 day of March, 1909, there was filed in said court an answer in words and figures, as follows, to wit:

[Answer.]

In the United States Circuit Court for the District of Oregon.

Suit in Equity for Injunction.

Answer.

E. A. ANDERSON, R. B. HERRON,

Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION

COMPANY, F. S. DOW AND PATRICK HENNESY,

Defendants.

Come now the defendants and for answer to the complaint of plaintiffs herein, admit, deny and allege as follows:

Admit all of the allegations contained in Paragraph III of said complaint;

Deny each and every allegation contained in Paragraphs I, II, IV, and V of said complaint except as hereinafter stated and admitted.

For a further and separate defense to the complaint of plaintiffs herein, defendants allege:

That the defendant The Oregon Coal & Navigation Company is, and at all times since the 15th day of April, 1889, has been, the owner in fee of the following described property, to-wit:

Beginning at N. E. corner of Lot 6 in Block 5, in Town of N. Marshfield, Coos County, Oregon, according to plat of said town prepared by James Aiken and on file in County Clerk's offce, and also according to a certain other plat of said Town of Marshfield, on file in County Clerk's office of said Coos County, and prepared by D. Breek in September, 1888; thence due N. to low water mark of Coos Bay; thence in Southeasterly direction along low water line to a point due East of place of beginning; thence due West to place of beginning, together with all the rights and privileges by virtue of being riparian owners, or otherwise, to wharf out in front of said described tract of land, except the following described

portion of said land which was heretofore and to-wit: on the 19th day of May, 1902, conveyed to the Coos Bay Ice & Cold Storage Company, to-wit:

All that certain lot, piece or parcel of land situate in the County of Coos, State of Oregon, and particularly described as follows, to-wit: commencing at the N. E. corner of Delta and Front Streets; thence Northerly along the E. side of Front Street 140 feet; thence Easterly to low water line; thence Southerly along low water line 100 feet to N. line of Delta Street; thence Westerly along N. line of Delta Street to a point of beginning, giving 100 feet of water frontage, same being Town of Marshfield, Oregon.

That as appurtenant to the land above described and by virtue of being riparian owners thereof, the said defendant Oregon Coal & Navigation Company has the right and privilege of wharfing out in front of said premises to the navigable waters of Coos Bay. That the said land above described and the riparian rights and right to wharf out to the navigable waters of Coos Bay appurtenant to said land included all of the land over which the defendants or any of them have driven piles or posts or otherwise exercised acts of dominion.

That the land above described and the riparian rights or right to wharf out to navigable waters of Coos Bay appurtenant thereto, lie in front of the said Lots 16 and 17 in Block 65, of said Nasburg's Addition to the Town of Marshfield, Coos County, Oregon, and between the said lots and the navigable waters of Coos Bay.

For a further and separate defense to the complaint of plaintiffs herein, defendants allege:

The defendant Oregon Coal & Navigation Company now is, and at all times since the 15th day of April, 1889, has been, the owner of and in the actual, visible, exclusive, hostile, open and notorious possession of the following described land, and all of the rights and privileges appurtenant thereof, to-wit:

Beginning at N. W. corner of Lot 6 in Block 5, in town of N. Marshfield, Coos County, Oregon, according to plat of said town prepared by James Aiken and on file in County Clerk's office, and also according to a certain other plat of said town of Marshfield, on file in County Clerk's office of said Coos County, and prepared by D. Breek in September, 1888; thence due N. to low water mark of Coos Bay; thence in Southeasterly direction along low water line to a point due East of place of beginning; thence due West to place of beginning, together with all the rights and privileges by virtue of being riparian owners, or otherwise, to wharf out in front of said described tract of land, except the following described portion of said land which was heretofore and to-wit: on the 18th day of May, 1902, conveying to the Coos Bay Ice & Cold Storage Company, to-wit:

All that certain lot, piece or parcel of land situate in the County of Coos, State of Oregon, and particularly described as follows, to-wit: Commencing at the N. E. corner of Delta and Front Streets; thence Northerly along the E. side of Front Street 140 feet;

thence Easterly to low water line; thence Southerly along low water line 100 feet to N. line of Delta Street; thence Westerly along the N. line of Delta Street to a point of beginning, giving 100 feet of water frontage, same being in Town of Marshfield, Oregon.

That more than ten years prior to the filing of the complaint herein, the defendant Oregon Coal & Navigation Company exercised its right to wharf out in front of its said property on that portion of said premises in front of said Lots 16 and 17, in Block 65, of Nasburg's Addition to the Town of Marshfield, Coos County, Oregon, and between the said Lots 16 and 17 and the navigable waters of Coos Bay, and ever since have been, and now are, in the actual, visible, exclusive, hostile, open and notorious possession thereof.

Wherefore, defendants pray that the temporary injunction heretofore issued herein be dissolved; that the defendants and each of them and all persons claiming by, through or under them be perpetually enjoined from in any way interfering with the use and occupation of said land and the rights appurtenant thereto by the defendants Oregon Coal & Navigation Company, it's agents, successors and assigns; that the defendants have judgment against the plaintiffs for their costs and disbursements herein, and for such other and further relief as to the Court may seem proper.

J. M. UPTON,
E. L. C. FARRIN,
GEO. N. FARRIN,
Attorneys for Defendants.

State of Oregon,
County of Coos,—ss.

I, Patrick Hennesy, being first duly sworn, depose and say that I am the managing agent of the defendant corporation, in the above entitled suit, that I make this verification for and on behalf of defendant corporation, and that the foregoing answer is true as I verily believe.

PATRICK HENNESY.

Subscribed and sworn to before me this 24th day of February, 1909.

GEO. M. FARRIN,
Notary Public for the State of Oregon.

[Endorsed]: Answer. Filed March 3rd, 1909, G. H. Marsh, Clerk.

And afterwards, to wit, on the 15 day of March, 1909, there was filed in said court a replication in words and figures, as follows, to wit:

[Replication.]

In the United States Court for the District of Oregon.

E. A. ANDERSON AND R. B. HERRON,
Plaintiffs,
vs
THE OREGON COAL & NAVIGATION CO., F. S. DOW AND PATRICK HENNESY,
Defendants.

Come now the plaintiffs and for reply to defendant's answer filed herein, deny each and every allegation contained in said answer.

State of Oregon,
County of Coos,—ss.

I, E. A. Anderson, being first duly sworn, on oath say, I am one of the plaintiffs in the above entitled case, I have read the foregoing replication and the allegation thereof are true as I verily believe.

[Seal] E. A. ANDERSON.

Subscribed and sworn to before me and in my presence this 10 day of March, 1909.

JAMES T. HALL.

I hereby acknowledge service and receipt of copy of this replication at Marshfield, Ore., this 11th day of March, 1909.

J. M. UPTON,
Of Attorneys for Defendants.

[Endorsed]: Replication. U. S. Circuit Court, Filed March 15, 1909, G. H. Marsh, Clerk.

And afterwards, to wit, on Thursday, the 11th day of November, 1909, the same being the 34th judicial day of the regular October 1909 term of said court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Fixing Time to Take Testimony.]

In the Circuit Court of the United States in and for the District of Oregon.

No. 3196.

November 11, 1909.

E. A. ANDERSON, R. B. HERRON,

Plaintiffs,

vs

THE OREGON COAL AND NAVIGATION COMPANY, F. S. DOW, PATRICK HENNESY,

Defendants.

On motion and stipulation of the parties plaintiff and defendant in the above entitled cause, it is ordered that Charles B. Selby, United States Commissioner at Marshfield, Oregon, be, and he is hereby, appointed Examiner to take and report the testimony of plaintiffs' and defendants' witnesses in the above entitled cause. That said testimony be taken orally before the said Examiner and reduced to typewriting, signed by the witnesses and returned to this Court.

That unless otherwise ordered, said testimony be returned to the Clerk of this Court on or before March 1st, 1910.

CHAS. E. WOLVERTON,
Judge.

And afterwards, to wit, on the 26th day of February, 1910, there was duly filed in said court, a stipulation in words and figures as follows, to-wit:

[Stipulation Extending Time to Take Testimony.

In the Circuit Court of the United States for the District of Oregon.

E. A. ANDERSON, R. B. HERRON,

Plaintiffs,

vs

THE OREGON COAL AND NAVIGATION COMPANY, F. S. DOW AND PATRICK HENNESY,

Defendants.

Stipulation.

It is hereby stipulated and agreed between the plaintiffs and defendants, by their attorneys, that the time for the taking of testimony in said cause shall be extended to April the 1st, 1910.

Dated this 21st day of February, A. D. 1910.

JOHN F. HALL,
One of Attorneys for Plaintiffs.

J. M. UPTON,
One of Attorneys for Defendants.

[Endorsed]: Stipulation. Filed February 26, 1910, G. H. Marsh, Clerk.

And afterwards, to wit, on Saturday, the 26th day of February, 1910, the same being the 124 judicial day of the regular October 1909 term of said court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Extending Time to April 1, 1910, in Which to Take Testimony.]

In the Circuit Court of the United States for the District of Oregon.

Order.

E. A. ANDERSON, R. B. HERRON,

Plaintiffs,

vs

THE OREGON COAL AND NAVIGATION COMPANY, F. S. DOW AND PATRICK HENNESY,

Defendants.

Upon stipulation of the parties by their attorneys, it is ordered, that the time for the taking of the testimony in the above entitled suit, be, and the same is hereby extended, until the 1st day of April, A. D. 1910.

CHAS. E. WOLVERTON,

Judge.

And afterwards, to wit, on the 29 day of March, 1910, there was filed in said court, testimony in words and figures, as follows, to wit:

[Testimony Filed in Case.]

In the Circuit Court of the United States for the District of Oregon.

[Stipulation.]

E. A. ANDERSON AND R. B. HERRON,

Plaintiffs,

vs

THE OREGON COAL & NAVIGATION CO.- F. S. DOW AND PATRICK HENNESY,

Defendants.

It is hereby stipulated by and between the plaintiffs and defendants, that the testimony in the above entitled cause, be taken before Charles B. Selby, U. S. Commissioner, at his office, in Marshfield, Coos County, Oregon, and the said parties by their attorneys, waive notice of the time for taking such testimony, and stipulate and agree, that the taking of same, shall continue from day to day, until completed. And the testimony, so taken, may be read on the trial of said cause, without objections, except such objections to the introduction of particular testimony, which objections shall be noted by the referee, at the time of the taking of the same. All irregularities, as to the time of taking testimony, and as to the manner of the taking of the same is hereby waived.

Dated this 29th day of March, A. D. 1910.

JOHN F. HALL,
A. S. HAMMOND,
JAMES T. HALL,
Attorneys for Plaintiffs.

J. M. UPTON,
E. L. C. FARRIN,
C. N. FARRIN,
Attorneys for Defendants.

[Endorsed]: Filed the 29th day of March, 1910. Chas. B. Selby, Special Examiner.

In the Circuit Court of the United States for the District of Oregon.

Stipulation.

E. A. ANDERSON AND R. B. HERRON,
Plaintiffs,

vs

THE OREGON COAL & NAVIGATION CO., F. S. DOW AND PATRICK HENNESY,
Defendants.

It is hereby stipulated between the parties to this cause and their attorneys, that plaintiffs herein are the owners of the property described in the complaint and that the defendants are the owners of the property described in the answer filed in this suit, except in so far as the descriptions of the said premises may conflict, if they do conflict.

JOHN F. HALL,
One of Plaintiffs' Attorneys.

J. M. UPTON,
One of Attorneys for Defendant.

In the Circuit Court of the United States for the District of Oregon.

E. A. ANDERSON AND R. B. HERRON,
Plaintiffs,

vs.

THE OREGON COAL & NAVIGATION CO., F. S. DOW AND PATRICK HENNESY,
Defendants.

Appeared before Charles B. Selby to take the following testimony; plaintiffs appeared by A. S. Ham-

mond, John F. Hall and James T. Hall, their attorneys, and defendants appeared by J. M. Upton and Farrin & Farrin, their attorneys.

Following witnesses were sworn to testify on behalf of the plaintiffs:

A. N. Gould, S. B. Cathcart, Geo. Rhoda, E. W. Burnett, E. A. Anderson, Jno. Herron.

In the Circuit Court of the United States for the District of Oregon.

Stipulation.

E. A. ANDERSON AND R. B. HERRON,
Plaintiffs,

vs.

THE OREGON COAL & NAVIGATION CO., F. S. DOW AND PATRICK HENNESY,
Defendants.

It is hereby stipulated between the parties to this cause and their attorneys, that plaintiffs herein are the owners of the property described in the complaint and that the defendants are the owners of the property described in the answer filed in this suit, except in so far as the descriptions of the said premises may conflict, if they do conflict.

JAMES T. HALL,
One of Plaintiffs' Attorneys.

J. M. UPTON,
One of Attorneys for Defendant.

S. B. CATHCART being called as a witness on behalf of the Plaintiffs, after being first duly sworn testified as follows:

Direct Examination.

(By Messrs. HAMMOND and HALL & HALL.)

Q. What is your name, age, residence and occupation?

A. S. B. Cathcart, age 67 years, residence Marshfield, occupation surveyor.

Q. What offices have you held in Coos County, Oregon, during the past 25 years.

A. Part of the time I was County Surveyor, in this County.

Q. For how many years?

A. Twenty.

Q. Are you acquainted with the premises in dispute in this suit?

A. I am.

Q. Have you made a survey of the same?

A. I have.

Q. When?

A. In April 1907 I made one and I have assisted in making another, that was in July 1909, I believe it was.

Q. To where did you make the survey in 1907?

A. Well, I made a partial survey there for P. E. Nicholson of the Cold Storage Plant, I think in 1903.

Q. Did you make a plat of the premises from the survey made by you?

A. I did.

Q. Where is that plat?

A. I have it here?

Q. Please produce the same.

A. As I said, I have a sketch of it here.

Q. Please explain on this plat how you made the survey and the results, showing on the plat, if possible, low water line of Coos Bay as described in the West boundary of defendants' answer.

A. Well, I don't know exactly what the west boundary of their Answer is.

Q. The West boundary of the land of the defendants, according to the Answer filed begins at the Northwest corner of Lot 6 in Block 5 of North Marshfield, (according to the plat of said town prepared by James Aikin and on file in the County Clerk's office and also according to another plat on file in the County Clerk's office prepared by D. Breek in September 1888,) thence due North to low water mark of Coos Bay, thence in a Southeasterly direction along low water line to a point due East of the place of beginning, thence due West to the place of beginning.

A. Yes, I commenced at the Northeast corner of Lot 6 in Block 5 and run North to low water of Coos Bay as shown here on this map.

Q. How many feet did you find between the Northwest corner of said Lot 6 and low water line?

A. 440½ feet.

Q. Was that ordinary or low water line?

A. As near as I could tell, about an average low tide.

Q. I note on this plat figures marked "65" within

lots from 1 to 19; please explain where low water line intersects this Block 65.

A. About the middle of the East end of Lot 18.

Q. The land claimed by the plaintiffs in this suit are Lots 16 and 17 in said Block 65 and I will ask you to follow the line due North from the Northwest corner of said Lot 6 and say if it was anywhere touching either of said lots?

A. It would not, except at a very low tide, it would cut five or six feet perhaps into Lot 17.

Q. That would be at an extreme low tide?

A. Yes, extreme low tide.

Q. But at an ordinary low tide, would it touch Lot 17?

A. It would not touch it, no.

Q. This plat was made from the field notes taken by you at the time you made the survey?

A. Yes, in April, 1907.

Q. You prepared the plat?

Q. Yourself?

A. Yes, sir.

Q. What does this "65" represent?

A. Block 65 in Bennett's Addition to Marshfield.

Q. I note a place on this map marked "Oil Building," will you please explain if you know what that is?

A. That is a house or building occupied by the Standard Oil Co., so far as the corner is concerned next to the shore line there.—

By Mr. UPTON.—We object to any testimony with respect to the oil house wherein the building on

the map is indicated as the oil house, for the reason that the same is incompetent, irrelevant and immaterial.

Answer continued. Well, it shows on here that from low water to the line South of the oil house it would be 13½ feet, where the line projects North it would intersect the South side of the oil house.

Q. Then, if I understand you, the Southeast corner of the oil house is outside of low water mark and also Easterly from the line running North and South?

A. Yes, that's it, extending from low water.

Q. Will you please explain the dots on this map, marked "piling"?

A. That is where I found a lot of piling had been drove that I had understood at the time was in controversy here, and that is just dotted to show approximately where the piling is; didn't measure any individual one, just put it down generally.

Q. Are those piles driven down loosely, without any caps?

A. I didn't notice any caps or anything of the kind on them, they had been drove only a short time before that.

Q. Is this line marked, low water line South 45 degrees East, the true low water line?

A. From where I intersected there up towards the Cold Storage Plant, that was the bearing as close as I could get it. This South or 45, should be North 45, 10 West, it should be North 45 degrees and 10 West instead of South 45-10, should have been North, that is all the difference.

Q. You found that to be the true low water line?

A. About as near as I could get to low water; I placed the instruments and took it each way; sometimes a foot tide will make a great difference in the bearing.

Q. Do these numbers in here represent lots in Block 65?

A. Yes, sir, as near as I could get it; of course I have always understood that the South side of the oil house was built flush with the line of Lot 15.

Q. I also note on this map Block 5 and Northwest corner Lots 6, please explain about that.

A. The data I was furnished to work from in making that survey was to commence at the Northwest corner of Lot 6 of Block 5 in North Marshfield.

Q. Then, if I understand you, the point with the circle, marked Northwest corner Lot 6 is the Northwest corner of Lot 6 of Block 5 in North Marshfield?

A. Yes, sir.

By Mr. HALL.—We offer this map in evidence.

By Mr. UPTON.—We object to the introduction of the map at this time.

By Mr. HALL.—We offer this map on which the witness has testified and ask that the same be marked as Exhibit No. L, over the plaintiff's objection.

By Mr. UPTON.—We object to the introduction of the map for the reason the same is incompetent, irrelevant and for the further reason that the methods adopted as shown by said map and as testified to by the witness as locating and indicating low water line are erroneous.

Q. You will please examine this plat and state whether or not you made the same?

A. Yes, I made that plat from my notes with some additional instruments. On examination of the Bennett Addition, I found out the bearing was given a little different to what I thought and in order to see if it would make such difference I took the bearing here from the South side of the oil house and turned if this was true—a little farther West the Northwest corner of Lot 6 of Block 5, and I found there was a little discrepensy and I saw it would throw the line, if this was true—a little further West the Northwest corner of Lot 6 was not exactly due South on the line I had run, providing the Bennett Addition was laid out right, but it only made a very small difference; it threw the line a litttle bit nearer to the North side of Lot 18 of Bennett's Addition—no material difference, by looking at the map you can see it was but very little difference.

Q. In either case, would the West line of the defendants' property touch either of the lots owned by plaintiffs, that is Lots 16 and 17 in Block 65, Bennett's Addition?

A. It would not.

Q. Give as near as you can the approximate distance from the Northeast corner of Lot 17 at mean low water.

A. About seven or eight feet.

Q. Does this figure 5 with the circle around it on the map represent Block 5 in North Marshfield?

A. It does.

Q. And the figure "6" is Lot 6 in said block from which you took your survey described in the defendants' Answer?

A. It is.

Q. When did you last survey this tract of land or assist in surveying it?

A. It was in July, 1909, I believe.

Q. Did you find any material difference in the distance from the Northwest corner of Lot 6 in Block 5 to low water?

A. Less than a foot difference.

Q. How long have you known this particular tract of land?

A. Been acquainted for a great many years, but never paid any particular attention until the surveys was made.

Q. In you opinion has the low water line changed since you became acquainted with the land?

A. I do not think it has materially changed.

Q. If any change, which way has it run?

A. Well, I do not see there is any change, a little sediment has run in from the dredgings but that has not thrown it very far; very little, if any, could not notice any material change.

Q. Do these two plats show, in a general way the low water line in reference to the plaintiffs' and defendants' property in dispute?

A. I think it does, according to my idea or understanding of it.

By Mr. HALL.—We wish to offer this map in evidence.

By Mr. UPTON.—Defendant objects to the introduction of the map, for the reason that the same is incompetent, irrelevant and immaterial and for the reason that the testimony given as to the marks thereon and the map itself as showing the methods adopted in ascertaining and indicating the low water line, are erroneous.

Mr. HALL.—We wish to offer this in evidence over the objection of defendants and ask that it be marked Plaintiffs' Exhibit No. 2.

Q. In ascertaining low water line of Coos Bay, how did you arrive at it?

A. In observing I did not have a tide table when I first made the survey, I took the tide when I thought it would be just about an average run-out, but the last time I was there to make a survey I was with Mr. Gould and we used the tide table at what was mean low tide and how much the tide ran out at that time and we took a point that would be mean low tide that morning.

Q. When was this?

A. The 15th of July, 1909, I believe, can refer to my memorandum and tell. Yes, on the morning of the 16th we took the tide at low water.

Q. You have been accustomed to surveying tide lands and tide flats have you not, for a number of years?

By. Mr UPTON.—Objected to as leading and suggestive of the answer sought.

A. I have.

Q. From your actual experience can you state

whether or not it was low tide at the time you took this observation?

A. Well, to the best of my knowledge, it was.

Cross Examination.

By Mr. UPTON:

Q. In running a line from the Northwest corner of Lot 6 in Block 5 to low water line as you found it, which line is indicated on plaintiff's Exhibit No. 1, did you run due North?

A. I did, as near as I could.

Q. What do you mean by saying "as near as you could?"

A. Well, to explain, I had previously taken the bearings of "A" street and I found it to be almost exactly due East and West and I used that as a basis and run a traverse line down to the corner of Lot 6, Block 5. I used a solar compass in getting the bearing of "A" street.

Q. Explain how you ascertained the location of the Northwest corner of Lot 6, Block 5 as indicated on plaintiff's Exhibit 1.

A. I took it from the Southeast corner of the Marks building, which has been recognized as being a permanent corner of Block 2 of North Marshfield, and I run down from that to get that corner.

Q. You made no surveys and run no other line to ascertain the location of the Northwest corner of Lot 6 in Block 5?

A. That is the only monument that ever I have known as a starting point from North Marshfield, is

the Southeast corner of the Marks building on Front and Third streets.

Q. In making the observations concerning which you testified you made on the 15th or 16th of July 1909, what tide table did you use?

A. One that is in use all around here by people through this country, claimed to be taken as the United States tide table.

Q. Isn't it the tide table that is furnished by Coast Mail Publishing Co., and is supplied to persons who have their advertisements put on the back of it?

A. I could not say as to that.

Q. Isn't it a small vest pocket affair?

A. Do not remember whether I used that one or the one Mr. Gould had, but I compared them with the United States tide tables and I found them correct and have never questioned them.

Q. For what year was that tide table?

A. 1909.

Q. Did you compare 1909 with the official tide table?

A. I do not know as I compared it with that particular one, have never found any diflerence I compared them and always relied upon them.

Q. And you mean to say you compared all of them —a great many of 1909?

A. No, different years.

Q. Those ordinarily put out by the printers in town?

A. Yes, sir, but I compared the most of them.

(Witness excused.)

S. B. CATHCART.

A. N. GOULD called as a witness on behalf of the plaintiffs, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. HALL:

Q. What is your name, age, residence and occupation?

A. Name, A. N. Gould, residence Coquille, aged 33, occupation surveyor.

Q. What official position do you hold in Coos County at the present time?

A. County Surveyor.

Q. How long have you been County Surveyor?

A. Since July 1908.

Q. How long have you been engaged in surveying work?

A. About eight years.

Q. Did you make a survey of the land in question in this suit, if so when and who assisted you?

A. I did, in July 1909, assisted by S. B. Cathcart.

Q. Did you make a plat of the survey as made at that time?

A. I did.

Q. Please produce it.

(Witness shows plat.)

Q. Is this the plat made by you from the notes taken on the ground at the time you made the survey?

A. Yes, sir.

Q. You will please explain the line of the West

boundary of defendants' land.

A. West boundary of defendants' land, which is the defendant?

Q. Oregon Coal & Navigation Co.

A. This is the line.

Q. The line marked on the map as No. 440 3-10 feet to medium low water?

A. That is it.

Q. You will please explain that portion of the map marked Bennett's Addition, Block 65, and the small figures from one to nineteen.

A. I do not understand you, hardly.

Q. Just what it represents?

A. Represents Block 65; the irregular line marked "mean low water" is mean low tide line and the line marked extreme low water, is extreme low tide line, and the line marked 440.3-10 feet to medium low tide is the line bounding the West of the Oregon Coal & Navigation Company's property.

Q. Does the West line of the Oregon Coal & Navigation Company's property touch either of the Lots 16 or 17 in Block 65, claimed by plaintiffs?

A. It does not.

'Q. How far is the West line of the Oregon Coal & Navigation Company's land East of the South line of Lot 17 in Block 65?

A. About 12 or 14 feet.

Q. How would it be if it extended to extreme low low water line?

By. Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial; the extreme low water line

is not in issue.

A. It would probably touch it two or three feet.

Q. Would it touch Lot 16?

A. It would not.

Q. How did you ascertain where the low water line was at the time you made this survey?

A. I set a stake shortly before the tide tables indicating that low water would be, and watched the raise and fall of the water until it had run out, then I measured beack an elevation of 1.44-100 feet which gave me a distance of 32.1-10 feet I believe horizontally to get mean low water; this 1.44-100 is given as the mean, both extreme and the mean low water.

Q. About what is the distance between mean low and extreme?

A. 32.1-10 feet measured horizontally and 1.44-100 vertically.

Q. You made this map from your notes made from an actual survey?

A. I did, yes, sir.

By. Mr. HALL.—We wish to offer this map in evidence.

By Mr. UPTON.—Objected to for the reason the same is incompetent, irrelevant and immaterial, and for the reason that the method pursued in ascertaining the West line of the defendants' property and the location and indication of low water mark, are erroneous.

Map is then received in evidence, subject to objection and marked plaintiffs' Exhibit No. 3.

Q. Was the survey from which this map was

made, made at the time S. B. Cathcart assisted you?

A. It was.

No Cross Examination.

(Witness excused)

A. N. GOULD.

E. W. BENNETT being called as a witness on behalf of the plaintiffs, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. HALL:

Q. What is your name, age, residence and occupation?

A. E. W. Bennett, Marshfield, 54 years, occupation raftsman.

Q. How long have you been engaged in rafting in the waters of Coos Bay?

A. 32 or 33 years.

Q. Are you acquainted with the property in dispute here between the plaintiffs and defendants?

A. I know where it is.

Q. How long have you known this property?

A. I have known the place for years but did not know who it belonged to.

Q. How long have you known the property?

A. Seven or eight years.

Q. You may state whether or not you occupied the property (claimed by the plaintiffs) at any time?

A. Yes, sir, I moved off of it between three and four years ago.

Q. When did you move onto the place?

A. I think I was on there about three years.

Q. From whom did you rent the land?

A. I did not rent from anybody; I asked Mr. Dow if he had any objection; I did not know who it belonged to.

Q. Did you pay any one rent?

A. I paid rent to Mr. Rhoda after I found he owned it.

Q. You paid him rent?

A. Yes, sir.

Q. Do you know when the piles were driven there in front of Lot 16?

A. On that lot where I lived? They were drove after I moved there.

Q. When?

A. They started in on Saturday night and drove all that night and Sunday.

Q. Now, from your acquaintance with this land, has the line of low water changed any?

A. No, I do not think it has filled in any.

Q. Has it washed out any?

A. I could not hardly say, do not think it has changed any.

Q. You do not think there is any change at all?

A. No, do not think there is.

Q. You may state how you came to move away from there?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. I think Mr. Anderson told me to move off.

Q. You moved off at his request?

A. Yes.

Q. Were you located on this Lot 16 or in front of it?

A. Right along side of the oil house.

Q. On the tide land itself?

A. No, in deep water, I was right on deep water.

Q. And you paid Mr. Rhoda rent?

A. Yes, sir.

Q. Do you know who drove those piles that were driven there?

A. No, I just saw them driving them.

Cross Examination.

By Mr. UPTON:

Q. You state you asked permission of Mr. Dow to put your scow there?

A. It was not a scow, but a big float.

Q. You asked permission of Mr. Dow to put that there?

A. Yes, sir.

Q. Who is Mr. Dow, what position does he hold with respect to the defendant O. C. & N. Co.?

A. He is agent for the Standard Oil Co.

Q. You know he is the agent for the Oregon Coal & Navigation Co.

A. I know he is agent for the steamboat.

Q. When was it Mr. Anderson told you to get off?

A. Well, we must have been in there, I could not say, about three years ago a little over, three years and a half, in the winter time.

Q. You were lying immediately along side of the Standard Oil Company's building?

A. Right along adjoining the piles on the South side—we got a dolphin.

Q. That dolphin is South of the Standard Oil building and in front of the lots in question, isn't it?

A. Yes, sir.

Q. That dolphin was there before the piles you spoke of were driven?

A. Yes, when I moved on it.

Q. As a matter of fact has been there for a good many years.

A. Do not know how much longer, they drove it there to give boats a chance to tie up.

Re-Direct Examination.

By Mr. HALL:

Q. You spoke of a dolphin having been driven there; please explain what a dolphin is?

A. Bunch of piling.

Q. How many piles?

A. I think four or five.

Q. Was this dolphin you spoke of driven near the land or in deep water?

A. Right in line with the East side of the warehouse.

Q. Is it in deep water?

A. Oh, yes, the boats land right along side of it.

Re-Cross Examination.

Q. The piles you speak of were driven in deep water, in line with the wharf line?

A. Which piles?

Q. That you saw them drive there.

A. Yes, sir, they stand in deep water, I guess, all of them.

Re-Direct Examination.

Q. Those piles are inside of the dolphin toward the shore, are they not?

A. Yes, sir.

Re-Cross Examination.

Q. How far is the outer row of piling inside of the dolphin?

A. They drove piling from the dolphin West.

Q. And South?

A. Well, they filled in there along side of the warehouse, do not know how far they were drove in.

Q. How far inside of the dolphin were the outer line of the piles you say were driven?

A. That, I could not tell.

Q. As a matter of fact were they not practically on a line running North and South with the dolphin?

A. From the dolphin to the warehouse you mean?

Q. Yes, and from the dolphin South.

A. From the dolphin there is no piles South.

Q. Then, from the dolphin North?

A. There is a row of piles from the dolphin North connecting with the warehouse.

(Witness excused.)

E. M. BERNETT.

GEORGE RHODA, being called as a witness on behalf of the plaintiffs, after being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HALL.)

Q. What is your name, age, residence and occupation?

A. George Rhoda, age 55, occupation, on the ferry-boat, deck hand.

Q. How long have you know the property in dispute between the plaintiffs and defendants herein?

A. Well, I think about a year or two.

Q. How long have you known this property, since you first saw the property?

A. About five or six years ago, and more.

Q. Were you ever the owner of the property?

A. Yes, sir.

Q. How long?

A. About one year and a half.

Q. When was that?

A. Must be about four or five years ago.

Q. During the time you owned it, did you rent it to anybody and collect rent?

A. Yes, sir, I did.

Q. Who to?

A. To W. M. Burnett.

Q. Is that the raftsman?

A. Yes, sir.

Q. You will please explain what was done with it by Mr. Burnett and where he kept his raft?

By Mr. UPTON.—Objected to as incompetent, ir-

relevant and immaterial.

A. He had it laid right in front of my property.

Q. Do you know where the low water line is in front of that property?

A. Pretty near.

Q. Has the line changed any since you have known it?

A. No, not much, if any.

Cross Examination.

(By Mr. UPTON.)

Q. You owned only Lot 16 did you not?

A. Yes, sir.

(Witness excused.)

GEORGE RHODA.

J. W. BENNETT being called as a witness on behalf of plaintiffs, after being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HALL.)

Q. State your name, age, residence and occupation.

A. J. W. Bennett, age 54 years, residence Marshfield, Coos County, Oregon, occupation, Attorney at Law.

Q. Are you acquainted with the land in dispute in this suit?

A. I think I am.

Q. You were formerly owner of the lands owned by plaintiffs, were you not?

A. Yes, sir.

Q. And you caused the same to be platted?

A. Yes, sir.

Q. You will please examine this plat and state whether or not that is a correct plat of the lands, as platted by you?

A. Yes, sir, this is a blue print of the platted portion of the original, which probably or undoubtedly are on file in the Recorder's office.

Q. I will ask you if this line here, marked North of low water is the correct line between the lands owned by the Oregon Coal and Navigation Co., and the Bennett Addition to Marshfield.

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial as the witness has not qualified himself to testify with reference to this.

A. This Bennett Addition plat is included in what was known as the Nasburg Addition to Marshfield and at the time Nasburg and myself caused the land to be platted. We instructed these surveyors to lay it off on the ground, as well as on paper and to mark it on the ground, which I believe they did, and I instructed them particularly with regard to finding the low water line, in view of that description of the Oregon Coal & Navigation Company's land adjoining, and he made this map or made the Nasburg map, of which this is a portion, in pursuance with instructions and that is where he located the boundary line.

By Mr. UPTON.—Defendants move to strike out the whole of witness' testimony for the reason it is not responsive to the question asked and is incom-

petent, irrelevant and immaterial.

Q. You will please explain the map thoroughly, particularly as to Block Sixty-Five (65) in Bennett's Addition to the Oregon Coal & Navigation Company's land, how you came to have it surveyed and platted and how it was made.

By Mr. UPTON.—Objected to as incompetent, immaterial and irrelevant.

A. I wanted to sell lots there and wanted to know where the line between the land owned by the Oregon Coal & Navigation Company was, and the Bennett Addition and I instructed the surveyor, Mr. Campbell, I believe, particularly in regard to arriving at the low water mark point as shown in front of Lot 18 in Block 65 of said Bennett's Addition, as I intended to sell lots by that line and wanted to be sure and give a good title.

Q. Has there been any material change in the low water line in front of Lots 16 and 17 in the past 20 years, to your knowledge?

A. I do not think there has, for the reason it is my recollection that Coos River flows (and has for years, probably a hundred years for all I know) past this same property and my recollection now is that the bedrock is within a foot of the top of the mud where Front Street is located and I think it shallows off, altho' there is some mud there. My idea would be from casually looking at it, that low water mark remains about the same.

Q. You say that that plat you hold in your hands at the present time, represents low water line as it

did at the time that survey was made, and practically at the present time?

A. That is my opinion but I could not tell without making a survey.

Q. You are acquainted with this property, are you not?

A. Yes, sir.

Q. You see it frequently?

A. Yes, sir.

Q. If any material changes you would be apt to notice them?

A. If I went at low tide I would, but I do not think there is.

By Mr. HALL.—We offer this map in evidence.

By Mr. UPTON.—We object to the introduction of the map for the reason that the same is incompetent, irrelevant and immaterial to prove any of the issues made by the plattings.

(Map is offered in evidence, subject to objection and marked Plaintiff's Exhibit 4.)

Cross Examination.

(By Mr. UPTON.)

Q. Did you ever make any observation or observations for the purpose of ascertaining or determining about where low water line was on the land?

A. I do not think I did, except that at the time the plat was made, I think Mr. Nasburg and myself went down there.

Q. You base your conclusion on your observation at that time?

A. Principally, we hired that man to make that map and told him what we wanted; we did not instruct him to do anything but just find low water line where that line runs up into low water line.

(Witness excused.)

J. W. BENNETT.

E. A. ANDERSON, one of the plaintiffs in the above entitled cause, called as a witness in his own behalf, and after being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HALL.)

Q. State your name, age, residence and occupation.

A. E. A. Anderson, do not know what my occupation is, am not doing anything, dabbling in real estate a little bit, age is 68.

Q. Are you one of the plaintiffs in this suit?

A. Yes, I am.

Q. Which one of the lots in question do you own?

A. I own Lot 16, Block 65, Nasburg's,—or Bennett's Addition.

Q. How long have you been acquainted with this lot?

A. Oh, I have been acquainted with that ground for forty years I know; I owned the ground above that for over 30 years.

Q. Are you acquainted and familiar with the low water line?

A. Yes, I have been there at all stages of the tide

waiting for high tide and low tide, all kinds of tides; I run a coal scow in there for about 25 years.

Q. Has there been any material change in the location of the low water line?

A. No change, not that portion of the town. I bought that with the understanding I was to use it as a coal yard, for the very reason that when they filled in front of my other property there with the dredge, the dredgings run in on my property and raised that position of the mud flat; no material change at all, on Lot 16, Block 65.

Q. When you speak of the dredgings running in, you meant the upper lot, not the lot in puestion?

A. No, it was not near it then. That is the lot in question.

Q. There has been some piling driven in front of your lot and also of Lot 17; will you please explain when and how that was driven?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. It was in 1907, just exactly the time of the year I cannot say, but it was in the winter time sometime the piling was driven. They went in there at midnight Saturday night and drove all that night and Sunday and Monday Mr. Hall came to me and said, "you are improving your property I see, you are driving piling." I said, well if I am I don't know it. I went down there and they were whacking away on the piles and I put a stop to it, if I had know it sooner would have been there before.

Q. Do you know at whose instance those piles were driven?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. I do not know exactly, but I think at the instance of Dow and Hennessy.

Q. Two of the defendants in this suit?

A. Yes, sir.

Q. Were those piles driven with your consent?

A. No, oh, no—I would have had them working day time if it was.

Q. What is this property principally valuable for?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. Valuable for any water front business or Front Street business, either one.

Q. What effect would it have on either one of these lots in question, if shut off from the water front?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. It would depreciate the value of the lots and make them worthless for any water front business.

Q. Then, as I understand you, the lots are principally valuable on account of the water front?

By Mr. UPTON.—Objected to for the reason that the same is incompetent, irrelevant and immaterial.

A. Yes, for their water front.

Q. These lots go out to deep water in front of these lots?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial, as leading and suggestive

of the answer sought.

A. Oh yes, they lead out to deep water.

Q. If these obstructions were allowed to remain would they interfere with the use of these lots and prevent you from getting out to deep water?

By. Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. I could not use them at all for the purpose I intended, for floating a scow, it could not get in at all.

Q. I will ask you whether or not these piles are driven near the ship channel?

By. Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. Yes, pretty close to the ship channel and driven in too, at low water mark.

Q. Could ships have come up to the lots?

By. Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. Oh yes, they could have.

Q. Did the piling driven by the defendants interfere with the view?

By. Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. They stuck all the sticks they could find, it looked like.

Q. Please describe these sticks and state whether or not they are for a permanent wharf?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. They look like small telegraph poles and are not fit for a wharf and not fit for a structure of any

weight, anybody can go and see that

Cross Examination.

(By Mr. UPTON.)

Q. Did you ever measure or estimate the timber, the smallest ones that are driven?

A. I never went out and measured them, can see them without going out.

Q. What could you see?

A. I could see some of them were piles and some of them as small as 10 inches.

Q. How far distant was this?

A. I did not go down to them, some of them I guess were smaller at the top than ten inches and some smaller at the bottom.

Q. Could you see the bottom part of these piles?

A. No, I mean at low water you could see.

Q. At low water could you see the piles?

A. Certainly, when the tide was down you could see they were smaller, as the water drops down.

Q. You think you have seen one pile there that is as small as ten inches?

A. Many of them too small for any structure or to place a dock on, no sane man would have driven them for a dock or a house.

Q. How many were there?

A. I do not know, I never counted the piling.

Q. Estimate the number?

A. I could not estimate them for I never counted them.

Q. You say all the piles there would not support a

house?

A. Not support a building of any weight.

Q. How far apart were they?

A. I could not tell you, never went to look at them.

Q. Were there 100 piles there?

A. I do not know, I cannot make a guess whether 100, 75, or 80.

Q. Are you prepared to say there is no piling there 14 inches in diameter?

A. Not prepared to say any such thing; they took everything they could get and stuck in the ground.

Q. When you say it would not support a house, what do you base that on?

A. I base my conclusions from the house adjoining, they drove piles there and look at it, when they put a few barrels of oil in there you can see it is settling down.

Q. What do you mean by the house along side of it?

A. I mean the oil house.

Q. Isn't it a fact that that warehouse has been used for a number of years for flour and grain?

A. It has been used, but never any great weight put in it; I used to haul freight away from there.

Q. Was it not used for storage at all?

A. Oh, at times, hay and feed.

Q. And flour?

A. Some flour.

Q. How much?

A. I could not tell you how much flour.

Q. Isn't it a fact you have seen on many occasions, the entire floor covered with iron tanks of oil, kerosene, gasoline, etc.?

A. Certainly I have seen oil in there.

Q. Isn't it a fact that the Standard Oil Co. uses that warehouse and has used it for a long time for the storage of all of its oil supplying Coos Bay, and that it receives large cargos at extended intervals on sailing vessels, because passenger steamers cannot carry it?

A. They do not carry so much as they did; if they keep on putting it in there it will fall down.

Q. Are they scared?

A. Well, I would be, I do not know if they have any judgment about it, whether it would fall down or not.

Q. How far South of the lots involved in this suit was your coal slip that you spoke of?

A. Quite a ways, do not know how many blocks, Must be three blocks, on the fourth block I think, I do not know the distance, you all know where it is.

Re-Direct Examination.

(By Mr. HALL.)

Q. You spoke of this warehouse not being in proper condition, you will please describe the warehouse as near as you can, the size and also the condition.

A. Well, the warehouse. the piling driven for the warehouse was driven with the intention of building on, and the lots in question, the piles were driven to try and confiscate the lot.

By Mr. UPTON.—Move to strike out the answer of the witness for the reason the same is not responsive.

Answer continued. As to the oil house, it does not take much of an eye to see how it is going and settling.

Q. About what is the length and width of the oil house?

A. I do not know, I suppose it would be, well the building is probably 80 feet, I think about 50x80.

Q. And it has settled out of shape?

A. It has settled everywhere out of shape.

Q. This warehouse is along side of your lot?

A. Yes, right North I think it is on a portion of Lots 14 or 15, I do not know which.

Q. And the warehouse property is principally valuable for warehouse purposes?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial and for the further reason it is leading and suggestive of the answer sought.

A. Yes, sir.

Q. Is your lot and the lot adjoining belonging to the plaintiff Herron, valuable for warehouse properties?

By Mr. UPTON.—Objected to as leading.

A. Oh, yes, that is what it is fit for.

Q. The channel passing these lots is the main ship channel to the sea?

By Mr. UPTON.—Objected to as leading and suggestive of the answer sought.

A. Oh yes, right by the ships' channel.

Re-Cross Examination.

(By Mr. UPTON.)

Q. Did you examine the piles under the warehouse?

A. No, I have no business under there.

Q. What is the size of them?

A. Look to be pretty large piles; I never went there to measure the piles, none of my business what kind of piles they have under there.

Q. Isn't it a fact that the warehouse settled on one corner and that is because the piles were not driven deep enough, and they settled five or six years ago?

A. If you cannot see it is crooked on more than one corner, you must have poor eyes for levels.

Q. So you do not know whether it is the want of a sufficient number of piles or because of the smallness of the piles used, that resulted in the settling?

A. No, I cannot judge that.

Q. Or because they were not driven deep enough?

A. I cannot tell you; those driven on the lots were just stuck in the ground.

Q. Did you see them stick any of them in the ground?

A. Yes, sir, I got there before they got done and forbide them going any further. I would probably have got down Sunday and told them if I had known it, but I didn't know it.

(Witness excused.)

(Plaintiff rests.)

E. A. ANDERSON.

Defendant wished adjournment until 10:00 o'clock A. M. following day.

At the appointed time, 10:00 o'clock A. M., March 30th, both parties appeared and defendants announced they rested and would introduce no testimony; and at the same time plaintiffs announced that they wished to introduce further testimony on their behalf, whereupon they adjourned until 2:30 P. M. the same day, to the introduction of which further testimony defendants object.

At 2:30 P. M., March 30th, the parties appeared and plaintiffs introduced the following testimony:

G. A. BENNETT being first duly sworn, testified on behalf of the plaintiffs.

Direct Examination.

(By Mr. HALL.)

Q. State your name, age, residence and occupation.

A. G. A. Bennett, age 53, residence Marshfield, occupation editor, Coos Bay News.

Q. Are you acquainted with the Marks building on the Southeast corner of Block 8 in North Marshfield?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. Yes, you mean where Dow's office is.

Q. How long has that building been there?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. It was built in '82 and '83, I think finished in '83.

Q. You may state whether or not you know that is on the corner of the block?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. All I know is, I was down there one day and was talking to Mr. Mark, the owner of the property, about lines and I asked "how did you fix it about this building?" He said we put this on the regular survey. Well, I said, you won't have any trouble with the Clemmons plat. We didn't talk any further about it, but I remember asking him the question and as near as I could understand he was careful to get it on the line.

Q. Has that corner been recognized as the corner of the block ever since it was built?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. We have understood it was. I understood from the city surveyor he took the line from that corner and allowed us seven or eight feet on what used to be Pine Street.

Q. The City of Marshfield recognizes that as the true corner of Block Eight?

By Mr. UPTON.—Objected to for the reason that the same is leading and suggestive of the answer sought, and is incompetent, irrelevant and immaterial.

A. The reason I supposed they did, I was speaking with the surveyor when he was blocking the street they used to call Third Street, he said you own seven or eight feet of this Pine Street and then he

said it runs into Mrs. Hirst's lot about 12 feet or something like that.

(Witness excused.)

G. A. BENNETT.

JOHN BEAR being called as a witness on behalf of plaintiff, after being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HALL.)

Q. What is your name, age, residence and occupation?

A. My name is Jno. Bear, I have been in the livery business this last 24 years in Marshfield, Coos County, Oregon.

Q. How long have you resided in Marshfield?

A. 1867, since that most of my time has been in Marshfield.

Q. Are you acquainted with the plat of North Marshfield, as originally laid out?

A. Well, yes, I am pretty well acquainted with the survey we made on Front Street, know all about it, I do not know what changes made lately.

Q. Were you here at the time Ef Marks built the building which now stands on the Southeast corner of Block Eight in North Marshfield, the building in which the steamship company now has its office?

A. Yes, I was in Marshfield at that time.

Q. Do you know whether or not the Southeast corner of that building was put on the Southeast cor-

ner of the block?

By Mr. UPTON.—Objected to for the reason the same is incompetent, irrelevant and immaterial.

A. The Southeast corner is right on that corner where the first survey was, the building was put in right on the corner.

Q. Has that corner been recognized at all times since that date as the true corner of that block?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial, witness has not qualified himself to answer the question.

A. Yes, as far as I know, always been.

Q. You may state whether or not you have any knowledge as to that being the basis from which all the buildings on Front Street and Third Street has been constructed since that was built?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. Front Street and Pine Street, Pine Street runs to the West.

Q. Front Street is in front of the building?

A. Yes, that is the corner of Third Street and Front Street, that is right on the corner.

Q. Has that been used as a basis for the location of other lots and buildings since the date of the construction of this building?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. That has been used, what we call the Marks property, they put up the front building and the little one behind, they put the foundations in about the

same time.

Q. These Marks buildings were placed on the lots soon after the survey was made?

By Mr. UPTON.—Objected to for the reason that the question is leading and suggestive of the answer sought and for the further reason it is incompetent, irrelevant and immaterial.

A. Yes, I think the survey was made in 1873, near as I can remember, I was interested in the survey in 1873. That's the time near as I can remember.

Q. You may state how you know this building was placed on the corner?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. How I know? I was interested in the survey of the town, I know how every lot was surveyed, I followed the survey, me and Mr. Nasburg and Mr. Walker, right through the Front Street and every building along there, why I know the corners.

(Witness excused.)

JOHN BEAR.

S. B. CATHCART recalled as a witness on behalf of the plaintiff.

Re-Direct Examination.

(By Mr. HALL.)

Q. Mr. Cathcart, in your testimony yesterday you stated that in begining the survey for the purpose of establishing the Northwest corner of Lot 6 in Block 5 in North Marshfield, you began at the Southeast corner of Block 2 in North Marshfield, you will

please explain why you commenced at this point?

By Mr. UPTON.—Objected to for the reason the witness never testified that he began at the point indicated in the question, and for the further reason it is incompetent, irrelevant and immaterial.

A. Well, I inadvertantly called it Block 2, it was Block 8, my notes show that, I got it in my head and unfortunately called it wrong at that time. I took for my basis to work from, the Southeast corner of Block 8, and I started in on "A" Street, that is where I originally started as a basis, as there is nothing down below from which I could get a true North course, and having frequently at times before that, not frequently, but two or three times, with a solar compass, I had taken the bearings of "A" Street and found it very nearly East and West and I used that as the basis to get my course, but I used the Marks building on the Southeast corner of Block Eight as the point to measure from to get the Northwest corner of Lot 6, Block 5.

Q. You may state what information you had as to whether this is a true corner of said Block Eight?

By Mr. UPTON.—Objected to for the reason it is incompetent, irrelevant and immaterial.

A. Well, from a general understanding we always had, I understood that was placed on the corner and when I was making the survey for Marshfield, Mr. Hirst told me the Marks building was exactly correct and I took his word for it.

Q. Who is Mr. Hirst you speak of?

A. Thos. Hirst, he was in the mercantile busi-

ness at one time here.

Q. You may state whether he was here at the time the suveys were made?

A. Yes he was; he resided here as far back as 1870, am pretty well satisfied he was here when I came.

Q. Will ask you whether this corner has been recognized as the true Southeast corner of Block Eight?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. Always been my understanding in all discussions of every kind with regards to surveys, that that was the true corner of the block.

Q. Have the surveys generally started from that corner in North Marshfield?

By Mr. UPTON.—Objected to as leading and suggestive of the answer sought.

A. So far as I know, they have.

'Q. State what the fact is as to the construction of buildings, both West and North as to this corner?

By Mr. UPTON.—Objected to as leading and suggestive of the answer sought, incompetent, irrelevant and immaterial.

A. Well, as to that I could not say, but the parties that have been building along have all seemed to be building on the street on the East side, very little on the West side, and as to the row they put on the East side, as to whether that is exactly correct, could not say, but it has been my understanding from the

fact they were put in a line and it is taken for granted they were.

Q. I understand you have been County Surveyor of this county for upwards of 20 years, have you, during the time you have been surveying, examined the official records of the plat of North Marshfield?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. Well, yes.

Q. Is there anything in the records by which you can tie this map or plat to any government corner, if not, please explain fully?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. I could find nothing by which I could connect it with any government survey, no more than two lines drawn on there would indicate a meander line, and nothing to show which was, and could come to no conclusion as to how it should connect.

Q. Is this map connected in any way with the government survey, or are there any figures to indicate that it is connected in any way with the government survey?

By Mr. UPTON.—Objected to for the reason the same is incompetent, irrelevant and immaterial and for the further reason that the map is the best evidence.

A. I could find nothing from which I could understand how it was connected with the government survey, might have been, but I coud not find anything, and that was one reason I used the Marks building

as it was the best evidence I could get and a true starting point.

Q. I hand you plaintffs' Exhibit 3, and will ask you if this is a correct reproduction of the official plat of North Marshfield?

By Mr. UPTON.—Objected to for the reason the same is incompetent, irrelevant and immaterial.

A. I would not say positively unless I had them where I could compare it, it appears to be, but of course I would not state positively, unless I could compare it.

Q. You will please point out the Marks building, from which you took your departure in making this survey?

By Mr. UPTON.—Objected to as incompetent, irrelevant and immaterial.

A. It is here on the Southeast of Block Eight, seems to be drawn in lines on this blue print.

Re-Cross Examination.

(By Mr. UPTON.)

Q. How many buildings North of the Marks building are there?

A. I could not answer right off, quite a number down there, the machine shop, the boat house and various others, the Cold Storage is beyond the angle, there are quite a number of buildings.

Q. The places you refer to at this time in answer to my last question are on the opposite side of the street from the Marks building?

A. Yes, on the East.

Q. How many buildings are there on the same side of the street as the Marks building and to the North?

A. Do not know, I could name some of them.

Q. Give them in their order, if you can?

A. I cannot do that, but there is the skating rink, one or two other buildings, but I paid no attention to them in making the survey.

Q. What buildings had you in mind when you testified a while ago, that the buildings North of the Marks building were evidently constructed on a basis of the true line of the North side of Block Eight?

A. Because they were in line with the Marks building.

Q. Then you do not wish to convey the impression that the buildings North of the Marks building on the same side of the street are not in line with the Marks building?

A. I do not know, I took the East side as there are a good many buildings you can line up from. I measured 30 feet in the middle of the street and took my lines from that on the East side.

Q. But those places are on the opposite side of the street from the Marks building?

A. Yes, on the opposite side of the street.

Q. Are all of the buildings on the opposite side of the street in line?

A. Practically so, practically in line.

Q. Isn't it a fact that the two old buildings, the buildings that were constructed many years ago, the Holland building and the McKnight building for instance, are not in line with each other?

A. Some of those buildings there were rather back a little, further to the East, but quite a number that would indicate very clearly that they were intended to be about in one straight line.

(Witness excused.)

S. B. CATHCART.

A. N. GOULD recalled as a witness on behalf of plaintiff.

Re-Direct Examination.

(By Mr. HALL.)

Q. Mr. Gould, I hand you plaintiffs' Exhibit No. 3, purporting to be plat of North Marshfield and a portion of Bennett's Addition to Marshfield, and ask you if you made that map?

A. I did.

Q. Is this portion marked "North Marshfield" a correct representation from the official map of North Marshfield?

By Mr. UPTON.—Objected to for the reason it is incompetent, irrelevant and immaterial.

A. Yes.

(Witness excused.)

A. N. GOULD.

It is admitted of record by defendants' attorneys that the date of the deed to the property claimed by the defendants is the 15th day of April, 1889.

[Examiner's Certificate.]

In the Circuit Court of the United States for the District of Oregon.

E. A. ANDERSON AND R. B. HERRON,
Plaintiffs,

vs.

THE OREGON COAL AND NAVIGATION COMPANY, F. S. DOW AND PATRICK HENNESY,
Defendants.

I, Charles B. Selby, United States Commissioner at Marshfield, Coos County, Oregon, do hereby certify that pursuant to a Commission to me issued out of the above entitled court and in the above entitled cause, empowering and authorizing me as Special Examiner to examine under oath any and all witnesses in above cause that might be brought before me to testify in above cause and to take said testimony and reduce same to writing, do hereby certify that on the 29th and 30th days of March, A. D. 1910, the following named witnesses were produced before me as witnesses on behalf of plaintiffs herein, to-wit: S. B. Cathcart, A. N. Gould, E. W. Bennett, George Rhoda, J. W. Bennett, E. A. Anderson, G. A. Bennett and John Bear; that each of said witnesses, before testifying herein, were by me first duly and legally sworn on their oaths to tell the truth, the whole truth and nothing but the truth herein and each testified in manner and form as shown by their respective testimony hereinbefore shown; that after their said testi-

mony was taken and transcribed each said named witness appeared before me and was given the opportunity to read, examine and correct their said testimony and each did read and correct his respective testimony in his own handwriting in my presence and afterward signed the same before me and in my presence and made oath thereto; and said corrected testimony was thereupon submitted to J. M. Upton and John F. Hall, respectively of counsel for the parties hereto and approved by each; that at all of the time at which said testimony was taken there were present at said taking the respective attorneys for the plaintiff and defendant; that the exhibits hereunto attached marked Exhibits "L," "2," "3," and "4" over the signature of myself as Special Examiner, are all of the exhibits offered and submitted in this cause and that the same are the true and identical exhibits offered in evidence herein and as referred to in the foregoing record; that said record contains all of the testimony submitted before me in this cause and is a true and correct record of the said proceedings before me and all thereof; that the signatures of the said witnesses hereinbefore shown are the true signatures of each respective witness; that said testimony of said witnesses was taken before me upon their oral examination and cross examination by the respective counsel of the parties hereto to-wit: John F. Hall, James Hall and A. S. Hammond for plaintiffs, and J. M. Upton, E. L. C. Farrin and Geo. N. Farrin for defendants;

That said record contains the objections, and all thereof, offered at said taking of said testimony as therein shown and that the stipulation attached on page "-O" at the beginning of this record was signed and filed with me as such Special Examiner prior to the taking of any testimony herein.

That the foregoing constitutes all of the record and proceedings had before me at the hearing hereof and that there is hereto attached my said Commission issued out of the above entitled court and in this cause for the taking of said testimony.

In witness whereof I have hereunto set my hand and affixed my seal as United States Commissioner at my office in Marshfield, Coos County, Oregon, this 2nd day of May, A. D. 1910.

[Seal] CHAS. B. SELBY,

United States Commissioner and Special Examiner in above entitled cause, under Commission of the above entitled court of date November 12th, 1909.

[Endorsed]: Filed May 16, 1910 and opened at final hearing June 28, 1911. G. H. Marsh, Clerk.

And afterwards, to wit, on Wednesday, the 28 day of June, 1911, the same being the 68th judicial day of the regular April 1911, term of said court; present, the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

[Judgment Entry.]

In the Circuit Court of the United States for the District of Oregon.

No. 3196.

DECREE.

E. A. ANDERSON AND R. B. HERRON,
Plaintiffs,
vs.
THE OREGON COAL & NAVIGATION COMPANY, F. S. DOW AND PATRICK HENNESY,
Defendants.

The above entitled cause coming on to be heard in open court, the plaintiffs appearing by John F. Hall, one of their attorneys, and the defendants appearing by J. M. Upton, one of their attorneys,

The Court after hearing the argument of counsel, and being fully advised, finds that the equities are with the plaintiffs, and that the plaintiffs are entitled to the releif prayed for in their complaint.

It is, therefore, hereby Ordered, Adjudged and Decreed that the defendants, and their agents, servants, and employees, be, and they are hereby, enjoined from driving any poles or posts, or erecting any structures, in front of and within the space comprised by the laterals extended to the ships channel of Lots numbered sixteen (16) and seventeen (17), in Block sixty-five (65), in Nasburg's Addition (re-plated as Bennett's Addition), to the Town of Marshfield, Coos County, Oregon, as the same is shown upon the plat

of said addition, recorded in the office of the County Clerk of said Coos County, Oregon, in Book 2 of Plats, page 110, and in Book 3 of Plats, page 51, of the records of said county, or in any way obstructing, occupying or encroaching upon the space between said lots and the ship channel on the navigable waters of Coos Bay, and that this order and decree be perpetual.

It is further Ordered that the plaintiffs recover and judgment is entered against defendants for the costs and disbursements herein.

Dated at Portland, Multnomah County, Oregon, this twenty-eighth day of June, A. D. 1911.

CHAS. E. WOLVERTON,

[Endorsed]: Filed June 28, 1911, G. H. Marsh, Clerk.

And afterwards, to wit, on the 26 day of December, 1911, there was filed in said court a petition for appeal in words and figures, as follows, to wit:

[Petition for Order Allowing Appeal.]

In the Circuit Court of the United States for the District of Oregon.

OREGON COAL AND NAVIGATION COMPANY,

Appellant,

vs.

E. A. ANDERSON AND R. B. HERRON,

Appellees.

The aboved named appellants, Oregon Coal and Navigation Company, a corporation, conceiving itself aggrieved by the order and decree made and entered on the 28th day of June, 1911, in the above entitled cause, in the above named court, hereby appeals from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith; and it prays that its appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated December 26th, 1911.

J. M. UPTON and
J. LE ROY SMITH,
Attorneys for Defendants in Error.

The foregoing appeal is hereby allowed this 26th day of December, 1911.

R. S. BEAN,
Judge.

[Endorsed]: Filed December 26, 1911, G. H. Marsh, Clerk.

And afterwards, to wit, on the 26 day of December, 1911, there was issued out of said court an assignment of error in words and figures, as follows, to wit:

[Assignments of Error.]

In the Circuit Court of the United States for the District of Oregon.

In Equity.

OREGON COAL AND NAVIGATION COMPANY,

Appellant,

vs.

E. A. ANDERSON AND R. B. HERRON,

Appellee.

The appellant in the above entitled suit, in connection with its petition for an appeal, make the following assignments of errors, which it avers occurred upon the trial of said cause:

I.

That the Court erred in granting injunctive relief, when the pleadings showed the issue to be a dispute over certain boundary lines.

II.

That the Court erred in finding sufficient proof as to either the point of beginning or ending of the above named appellee's holdings, assuming the Court had acquired jurisdiction.

III.

That the Court erred in assuming jurisdiction, under the issues presented.

IV.

That the Court erred in finding that the "equities

were with the plaintiffs and that plaintiffs are entitled to the relief prayed for in their complaint."

V.

That the Court erred in considering the exhibits offered in evidence on the part of plaintiffs, the same not being shown authentic, properly identified as plats of the locality represented nor certified as required by law.

VI.

That the Court erred in considering the question of tides presented in the testimony on behalf of appellees, the same coming from unqualified witnesses— and their statements wholly incompetent, irrelevant and immaterial for the purposes offered under objection.

VII.

That the Court erred in granting the relief demanded by appellees, when it lacked jurisdiction to have determined the question of ownership or right of possession of real property.

VIII.

That the Court erred in its failure to find for appellants on the ground of failure of proof, on the part of appellees; and the absence of any proof to sustain the allegations of plaintiffs; and lastly: that because of such error appellant has suffered, or will suffer, irreparable injury if redress does follow forthwith.

J. M. UPTON and
SMITH, LUNDBURG & ULRICH,
Attorneys for Defendants in Error.

[Endorsed]: Assignment of Errors. Filed Dec. 26, 1911, G. H. Marsh, Clerk.

And afterwards, to wit, on the 26 day of December, 1911, there was filed in said court an order allowing appeal in words and figures, as follows, to wit:

[Order Allowing Appeal.]

In the Circuit Court of the United States for the District of Oregon.

No. 3196.

E. A. ANDERSON AND R. B. HERRON,

Plaintiffs,

vs.

OREGON COAL AND NAVIGATION COMPANY,

Defendants.

On this 26th day of December, 1911, came the appellant, Oregon Coal and Navigation Company, by J. LeRoy Smith, one of its attorneys, appearing in its behalf, and filed herein and presented to this Court its petition, praying for the allowance of an appeal, intended to be urged by it to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree entered in the above-entitled cause and in the above-entitled court on the 28th day of June, 1911, and also praying that a transcript of the record, proceedings and evidence of papers, on which said decree was herein rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals

for said Ninth District, and such other and further proceedings may be had, as may be proper in the premises.

In consideration whereof, the Court does hereby allow the appeal prayed for in said petition.

R. S. BEAN,
Judge.

[Endorsed]: Order Allowing Appeal. Filed Dec. 26, 1911, G. H. Marsh, Clerk.

And afterwards, to wit, on the 26 day of December, 1911, there was filed in said court an Undertaking on Appeal in words and figures, as follows, to wit:

[Undertaking on Appeal.]

In the Circuit Court of the United States for the District of Oregon.

OREGON COAL AND NAVIGATION COMPANY,

Appellant,

vs.

E. A. ANDERSON AND R. B. HERRON,

Appellees.

Know All Men By These Presents, That, we, Oregon Coal and Navigation Company and Pacific Coast Casualty Company, a corporation of San Francisco, Cal., are held and firmly bound unto E. A. Anderson and R. B. Herron in the sum of Five Hundred (500) Dollars, to be paid to the said E. A. Anderson and R. B. Herron, their executors or administrators. To

which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators or assigns firmly by these presents.

Sealed with our seals and dated December 26th, 1911.

Whereas the above named appellant is desirous of appealing to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the cause of E. A. Anderson and R. B. Herron, plaintiffs versus Oregon Coal and Navigation Company, F. S. Dow and Patrick Hennessy, defendants, by the Circuit Court of the United States for the District of Oregon, on the 28th day of June, 1911.

Now, therefore, the condition of the obligation is such, that if the above named Oregon Coal and Navigation Company shall prosecute said appeal to effect, and answer all costs on such appeal to said appellees if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Signed, sealed and delivered in the presence of

OREGON COAL & NAVIGATION COMPANY,
by J. LE ROY SMITH, one of its Attorneys. [LS]

PACIFIC COAST CASUALTY COMPANY, [LS]
By PHILLIP GROSSMAYER, Attorney in Fact. [LS]

[Seal]

PETTIS-GROSSMAYER CO.,
General Agent.
By PHILLIP GROSSMAYER,
Secty.

The foregoing undertaking approved this 26th day of December, 1911.

R. S. BEAN,
Judge.

[Endorsed]: Bond. Filed December 26, 1911, G. H. Marsh, Clerk.

And afterwards, to wit, on the 10 day of April, 1912, there was filed in said court a citation on appeal in words and figures, as follows, to wit:

[Citation on Appeal.]

United States of America,
District of Oregon,—ss.

To E. A. ANDERSON and R. B. HERRON, Appellees, JOHN F. HALL and A. S. HAMMOND, Esqs., of Counsel for Appellees, Greeting:

Whereas, Oregon Coal and Navigation Company, a corporation, appellant, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the Circuit Court of the United States for the District of Oregon, and has given the security required by law; you are, of the United States for the District of Oregon, in your favor, and has given the security required by law; you are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why

the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 26th day of December, in the year of our Lord, one thousand, nine hundred and eleven.

R. S. BEAN,
Judge.

Service of the above citation accepted at Marshfield, Oregon, this 28 day of December, 1911.

JOHN F. HALL, one of Attorneys for Appellees.

[Endorsed]: Filed April 10, 1912, A. M. Cannon, Clerk.

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No. 2153.

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

OREGON COAL & NAVIGATION CO.,

Appellant.

vs.

E. A. ANDERSON and R. B. HERRON,

Appellees.

Upon Appeal from the United States District Court, District of Oregon.

Appellant's Brief

J. M. UPTON, Marshfield, Oregon,

J. LeROY SMITH, Portland, Oregon.

Attorneys for the Appellant.

STATEMENT.

This is a suit in equity.

The complainants (appellees) are the owners of the lots numbered 16 and 17 in the block numbered 65, of Nasburg's Addition (re-platted as Bennett's Addition) to Marshfield, Oregon. (Record p. 51.)

The appellant is the owner of adjoining property which is described in the answer, and which would here be described but that a description thereof would unnecessarily extend this statement and serve no useful purpose. (Record, p. 51 and pp. 40-41.)

Paragraph numbered II. of the complaint reads as follows.

"That said lots are bounded on their Easterly and Northerly side by the low water mark of Coos Bay, which is a navigable body of water wherein the tide ebbs and flows and the plaintiffs as owners of said lots, *also own, as appurtenant thereto, the right and privilege to build docks or wharves out into the waters of*

Coos Bay to the edge of navigable water; and the principal value of said lots arises from the facts that the owners of said lots have such right and privilege and without said right and privilege said lots would be comparatively worthless.''

The paragraphs numbered IV. and V. of said complaint are as follows:

''That the defendant, the Oregon Coal and Navigation Company, by its said agents and employees, without any right, permission or authority so to do, did, on or about the........ day of March, 1907, secretly and surreptitiously and in the night time, go upon the submerged lands *lying between the plaintiffs' said lots and the navigable waters of Coos Bay and drive therein and thereon numerous piles and posts, which are firmly* imbedded in the soil and extend and protrude above the waters of said Coos Bay a distance of from 6 to 12 feet, thus entirely shutting off the plaintiffs to the ship canal and the navigable waters of Coos Bay.

''And the defendants threaten and give forth that they will continue to so drive piles and posts in front of plaintiff's said lots and that they will place timbers and planks thereon and that they will erect structures thereon that will completely cut off the plaintiffs from and prevent all access to the ship canal and the navigable waters of Coos Bay.

''And the plaintiffs believe and so believing

allege that unless prevented by the order of this Crout the defendant will so do and plaintiffs allege that such acts will cause great and irreparable injury and damage to plaintiffs and that the amount or extent of such injury could not be measured or ascertained."

"That the plaintiffs have no plain, speedy or adequate remedy at law." (Transcript, pp. 5-6.)

The relief asked is that the defendant (appellant) be enjoined from committing the acts complained of.

The answer denies all of the matters contained in paragraps II., IV. and V.

Three separate defenses were set out in the answer, but as we view the matter, only one will be necessary to be considered by the Court. It is as follows:

"That as appurtenant to the land above-described, and by virtue of being riparian owners thereof, the said defendant, the Oregon Coal and Navigation Company, has the right and privilege of wharfing out in front of said premises to the navigable waters of Coos Bay.

"That the said land above described and the riparian right and the right to wharf out to the navigable waters of Coos Bay appurtenant to said land included all of the land over which the defendants or any of them have driven

piles or posts or otherwise exercised acts of dominion.

"That the land above described and the riparian rights or right to wharf out to the navigable waters of Coos Bay appurtenant thereto, lie in front of the said Lots 16 and 17 in Block 65, of said Nasburg's addition to the town of Marshfield, Coos County, Oregon, and between the said Lots and the navigable waters of Coos Bay."

A demurrer was filed to the bill, and over ruled. (Record, p. 41 and pp. 38-9.)

Considerable testimony was offered on the part of complainants (appellees), a large part of it being hearsay and the conclusions of witnesses. The evidence tended to show the location of the low water mark in front of, and adjoining the premises described in the bill and answer.

The only testimony in support of the unlawful acts complained of in the bill, i. e., that appellant unlawfully and surreptitiously drove numerous piles and posts in front of the appellees' property described in the bill, entirely shutting off their access to the ship canal and the navigable waters of Coos Bay, and that appellant threatened and gave forth, that it would continue so to do, is contained on pages

76-7 of the record. It is very brief and we will quote it:

"Q. There has been some piling driven in front of your lot and also of Lot 17; will you please explain when and how that was driven?"

"A. It was in 1907, just exactly the time of year I cannot say, but it was in the winter time sometime the piling was driven. They went in there at midnight Saturday night and drove all that night and Sunday and Monday Mr. Hall came to me and said, "you are improving your property I see; you are driving piling." I said, well if I am I don't know it. I went down there and they were whacking away on the piles *and I put a stop to it.* If I had known it sooner would have been there before.

Q. *Do you know at whose instance those piles were driven?*

A. *I do not know exactly, but I think at the instance of Dow and Hennessy.*

Q. Two of the defendants in this suit?

A. Yes, sir.

Q. Were those piles driven with your consent?

A. No, oh, no—I would have had them working day time if it was."

There was no testimony offered of any kind to the effect that complainants (appellees)

owned, as appurtenant to the premises described in the bill, "the right and privilege to build docks and wharves out into the water of Coos Bay to the edge of navigable water."

Appellant offered no testimony, but challenged the sufficiency of appellees showing, as it had theretofore, by demurrer, challenged the sufficiency of the bill. A decree was entered according to the prayer of the bill in favor of appellees, from which this appeal is taken.

At p. 101, et seq., will be found appellants assignment of errors.

APPELLANT ON THIS APPEAL RELIES UPON AND MAKES THE FOLLOWING SPECIFICATIONS OF ERROR:

1. The bill of the complaint did not state facts sufficient to entitle appellees to any relief in equity.

2. The evidence offered on the part of appellees was insufficient to entitle them to any relief in equity.

3. The relief given appellees was contrary to equity and erroneous.

4. The decree should have been for appellant.

5. A Court of Equity was without jurisdiction, under the pleadings and evidence.

ARGUMENT.

It seems so clear to us from the foregoing statement that complainants (appellees) have (a) mistaken their remedy and (b) have utterly failed in their testimony to make a case of either equitable or legal cognizance, that the foregoing statement of the case should be a sufficient argument of it.

It is evident that the parties had a dispute as to the boundary line between their property, and as to their riparian rights. Appellant being in possession of the disputed area, appellees would recover the possession and determine the respective boundaries, ownership and riparian rights by a suit in equity. This they cannot do; their remedy, if they have one, is at law.

In Hipp et al. vs. Babin et al., 19 Howard

271, it was held (we quote from the syllabus):

"A court of equity will not entertain a bill, where the complainants seek to enforce a merely legal title to land; and in the present case, in the absence of allegations that the plaintiffs are seeking a partition, or a discovery, or an account, or to avoid a multiplicity of suits, the bill cannot be maintained."

But if during the pendency of an action at law it should be made to appear that they would suffer irreparable damage; in other words if the action at law is inadequate, a suit in equity, *ancillary to the action at law,* could be maintained, to hold the subject of the litigation in statu quo, until the rights of the parties could be determined in the law case. See Parker vs. Lake Cotton Company, 2 Black, U. S., 552, where it was said:

"Where an injunction is granted without a trial at law, it is usually upon the principle of preserving the property, until a trial at law can be had. A strong prima facie case of right must be shown, and there must have been no improper delay. The Court will consider all the circumstances and exercise a careful discretion."

And in Irwin vs. Dixon (9 Howard (U. S.), 10), it was said:

"Until the rights of the parties are settled

at law, only a temporary injunction is issued to prevent irreparable injury."

The judiciary act provides that "suits in equity shall not be maintained in either of the Courts of the United States in any case where plain, adequate and complete remedy can be had at law." But where the remedy at law *is adequate* the adverse party has a *constitutional right to a trial by jury.* 19 Howard (U. S.), 278. And in Noonan vs. Lee, 2 Black, U. S. 509, the Court said:

"The equity jurisdiction of the Courts of the United States is derived from the Constitution and laws of the United States. Their powers and rules of decision are the same in all the States. Their practise is regulated by themselves, and by rules established by the Supreme Court. This Court is invested in law with authority to make such rules. In all those respects they are unaffected by State legislation. Neves vs. Scott (13 Howard 270); Boyle vs. Zachary Turner, (6 Pet, 658); Robinson vs. Campbell, (3 Wheat. 323)."

Appellees have not brought an action at law, but rely entirely for redress upon this suit in equity. As before stated they allege that they will sustain irreparable damages if the injunction prayed for does not issue, and this is the gravamen of the suit, but when they come to

offer their evidence in support of their bill, they utterly fail to show that appellant committed any of the acts complained of, or that it even threatened to do so. On the contrary appellee Anderson, as we have shown, testified only that someone was driving piles; but he does not even make it clear where the piles were being driven, and states:

"And *I put a stop to it.* If I had known it sooner would have been there before. Q. Do you know at whose instance those piles were driven? A. *I do not know exactly,* but I think at the instance of Dow and Hennessy." (Record, pp. 76-7.)

That is all the testimony there is on the subject. If appellees had, as he testified, stopped the threatened injury, what was the necessity for an injunction, and where and how are appellees threatened with irreparable injury? Appellant in its answer denied the driving of any piles, and appellee offered no testimony on the subject, except that by appellee Anderson before quoted, wherein he stated he did not know exactly who drove the piles, but he thought that they were driven at the instance of Dow and Hennessy, whoever they may be.

The allegation in the bill that appellees were entitled to wharf out in front of and beyond the

lines of their property described in the bill, is unsupported by testimony of any kind, name or nature. The record is absolutely silent upon the proposition. Appellees may have proceeded, and evidently did proceed, upon the theory that ownership of a town lot, lying in close proximity to navigable water, possesses in law, as one of the incidental appurtenances, the right to wharf out in front of and beyond the lines to deep water. That such rights *do not necessarily* follow and attach to such ownership was plainly and unequivocally decided by the case of Bowlby vs. Shively, 152 U. S. 1. Otherwise stated, the rights contended for by appellees depend upon the boundaries of the lots, the nature and character of the title of their grantor, and the source of his title; and also depend upon the nature and character of their conveyance; because, even though their grantor possessed such right, he may not have conveyed it, the deed may have contained a reservation. Until appellees made such showing by proper evidence, no Court could determine what their rights were.

The decree is an absolute, irrevocable adjudication of the boundary line, the ownership and the riparian rights of the parties, and this is

a proceeding wherein they were denied a trial by jury.

The complainant must show not only the existence of his right, but he must show that the acts sought to be restrained will be a violation thereof. There must be what the law regards as a legal injury, not a mere inconvenience.

22 Cyc. 756.

It is not sufficient to authorize the remedy by injunction that a violation of a naked legal right of property is threatened. *There must be some special ground of jurisdiction.*

Id. 757 (note).

Where there is a reasonable doubt as to the right or title of the applicant for an injunction to protect property, equity will not interfere in the absence of an emergency, until the right or title has been established at law.

Id. 819.

A Court of Chancery is not the appropriate tribunal for the trial of title to land, and where the main object of a suit asking for relief by injunction is to determine the legal title to property, *or to fix the boundaries of land,* equity will not interfere by injunction but will remit the parties to a Court of law.

22 Cyc. 821.

The principle of injunctive relief against a tort is that whenever damage is caused or threatened to property admitted or legally adjudged to be the plaintiff's, by an act of the defendant, admitted or legally adjudged to be a legal wrong and such damage is not remediable at law, the inadequacy of the remedy at law will warrant an injunction against the commission or continuance of the wrong.

Andries vs. Detroit R. R. Co. (Mich.), 63 N. W. 527.

When a bill alleges matter for the jurisdiction of a Court of equity so that a demurrer will not lie, if it appear at the hearing that the allegations are false, and that such matter does not exist, the result must be the same as if it had not been alleged, and the bill should be dismissed for want of jurisdiction. In other words, when it appears at the hearing of the cause, upon the pleadings and proof offered that the real object of the bill is to settle in a Court of Chancery a *controverted boundary of lands,* it should be dismissed for want of jurisdiction.

Calloway vs. Webster (Va.), 37 S. E. 276.

True, equity will, upon occasion, determine disputed boundaries, but it is not the rule. It is only upon a clear and strong showing, upon

the pleadings and proofs, of the right to injunctive relief in the first instance, that the Court will thus intervene. Here was no such showing. Complainants' right to relief is not evident. There is practically a total absence of first instance or impelling grounds for such relief. It was not shown that the lots were necessary for any particular or useful purpose, or that they were "rendered worthless" for such purpose. There was no interference, no interruption, no annoyance, no embarrassment, no substantial anything which could invoke equitable intervention—even ordinarily.

As we have had occasion heretofore to remark, there is a total want of proof in support of the right of the complainants (appellees) to wharfage privileges, as appurtenant to the lots, or otherwise; they have wholly failed to support the only allegations which could move a Court of equity to entertain the cause in the first instance, and they "stopped" the work before injunction issued.

Respectfully submitted,

J. M. Upton

J. LeRoy Smith

Attorneys for Appellants.

CERTIFICATE.

State of Oregon, }
County of Coos. } ss.

I hereby certify that the foregoing Brief is a true and correct copy of Appellant's Brief and of the whole thereof.

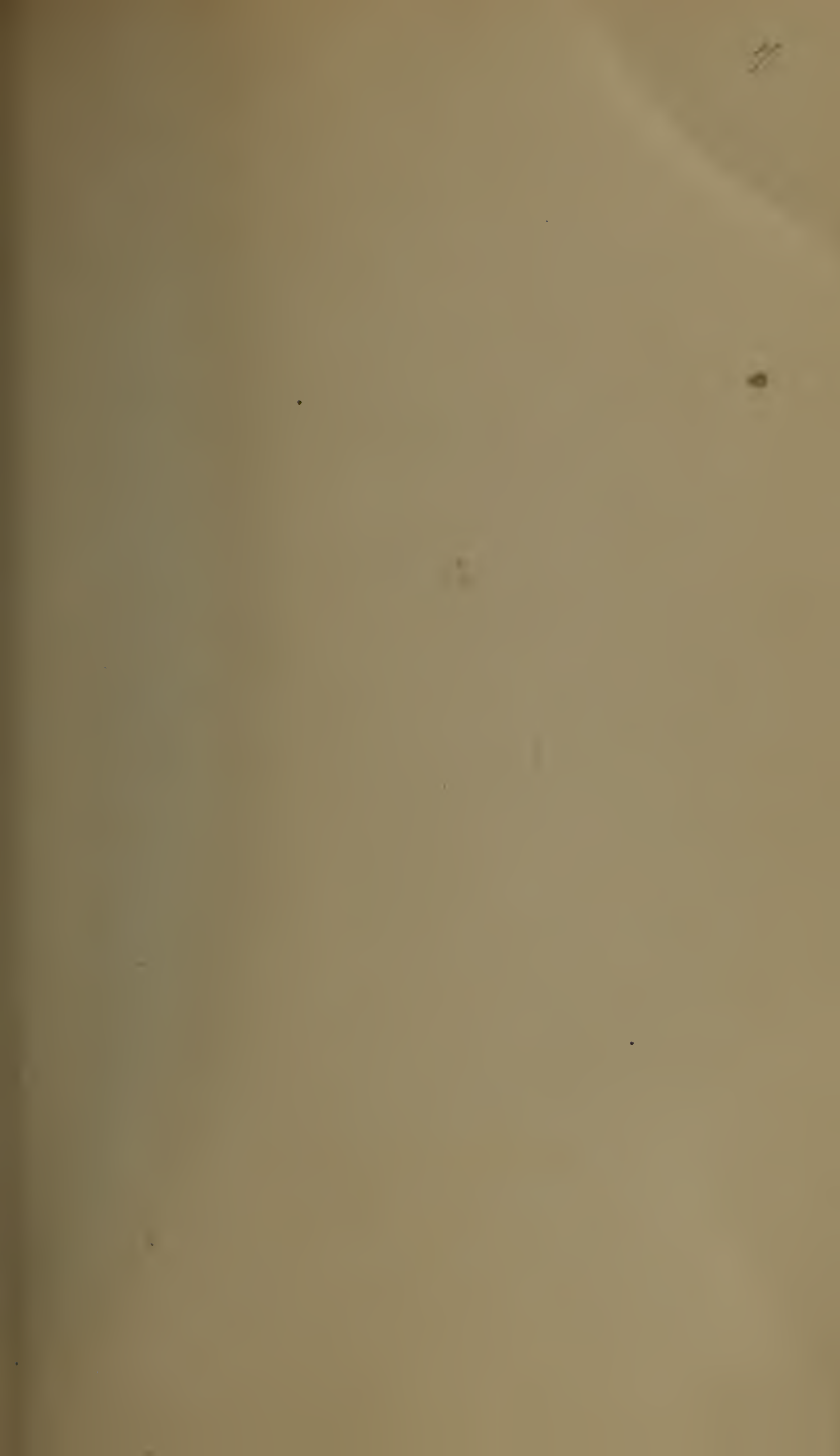
....
of Attorneys for Appellant.

ACKNOWLEDGMENT OF SERVICE.

County of Coos. }
State of Oregon, } ss.

Due and legal service of Appellant's Brief in the within entitled cause is hereby acknowledged this........day of ...., 1912, by the receipt personally within Coos County, Oregon of a duly certified copy thereof.

....
of Attorneys for Appellees.



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In the

United States Circuit Court of Appeals

for the Ninth Circuit

October Term, 1912

San Francisco, California

Oregon Coal & Navigation Co., appellant, *vs.* E. A. Anderson and R. B. Herron, appellees.	No. 2153.

BRIEF OF APPELLEES.

STATEMENT.

This suit was brought by the plaintiff appellees for an injunction to restrain the defendant appellant and certain other defendants named in the complaint, from building a wharf in the waters of Coos Bay, Oregon, fronting and abutting upon property owned by the plaintiffs and described as Lots 16 and 17 in Block 65 in Nasburg's Addition (replatted as Bennett's Addition) in the Town of Marshfield, Coos County, Oregon (Trans. pages 4 to 7 inc).

It has been stipulated (Trans. p. 51) that the appellees are the owners of said lots and that the ap-

pellant is the owner of the land described in its answer (Trans. pages 40 to 43 inc.) except in so far as the descriptions of the said premises may conflict, if they do conflict.

The question involved is the right of appellees to an injunction restraining the appellant from constructing a wharf in front of appellees' premises. The trial Court found that the equities were with the plaintiffs and permanently enjoined the defendants from erecting any construction in front of and within the space comprised by the laterals extended to the ships channel, of the appellee's lands (Trans. pages 98-99).

POINTS AND AUTHORITIES.

POINT I.

Appellees, as the Owners of Land Lying upon the Shores of Coos Bay Have the Paramount Right, by Virtue of Their Ownership, to Connect Their Shore Line by Wharves or Piers with the Outside Navigable Water.

The testimony clearly shows that appellee's lands front upon the navigable waters of Coos Bay and that they are chiefly valuable as water front property (Trans. pages 77, 78 and 82). If appellant's westerly line running from the northwest corner of Lot 6 in

Block 5 in the Town of North Marshfield due north to the low water line of Coos Bay, does not meet such low water line at a point within the side lines of appellee's lands extended and it appears from all the testimony taken (See testimony of S. B. Cathcart, Trans. pages 53 to 61 inc. and testimony of A. N. Gould, Trans. pages 63 and 64) and from the exhibits (See particularly Exhibit 3), that it does not, then there can be no question of the paramount right of appellees to have unobstructed access to deep water. The question of the location of appellant's westerly line and of the low water line of Coos Bay will be considered later.

In Oregon the right of riparian owners to wharf out to deep water is secured to them by Statute. This right is defined by Statute as follows: (Sec. 5201 Lord's Oregon Code).

> "The owner of any land in this State lying "upon any navigable stream or other like "water, and within the corporate limits of any "corporate town therein, is hereby authorized "to construct a wharf or wharves upon the "same, and extend such wharf or wharves into "such stream or other like water beyond low "water mark so far as may be necessary and "convenient for the use and accommodation "of any ships or other boats or vessels that "may or can navigate such stream or other "like water."

The operation of the Oregon Statute has been determined judicially in several Oregon cases:

Parker vs. Taylor, 7 Oregon 436.

Lewis vs. City of Portland, 25 Oregon, 133-134-164-169.

Montgomery vs. Shaver, 40 Oregon 244-247. (66 Pac. 923)

In addition to the Oregon cases there are many other authorities in which this right of riparian owners to have access to navigable water is emphasized.

Dutton vs. Strong, 1 Black (U. S. 1) 17 Law. Ed. 29.

Illinois vs. Illinois C. R. Co. 146 U. S. 387-476.

Shively vs. Bowlby, 152 U. S. 1.

Janesville vs. Carpenter, 77 Wis. 288 (20 Am. St. Rep. 23)

Baltimore vs. St. Agnes Hospital, 48 Md. 419.

Rumsey vs. N. Y. & N. E. R. R. Co. 133 N. Y. 78 (28 Am. St. Rep. 600)

Weber vs State Harbor Commission, 18 Wall 57 (85 Law. Ed. 798)

Farnham on Water and Water Rights, Sec. 113, p. 529; Sec. 113 B. p. 533; Sec. 113 C. p. 539.

POINT II.

The Riparian Owner is Only Entitled to Construct a Wharf In Front of His Land Within a Space Determined by Lines Drawn at Right Angles from the Thread of the Stream to the Shore Termini of the Side Lines of His Land.

In Montgomery vs. Shaver, 40 Oregon 245 (66 Pac. 923) the Court says on page 246:

> "The right to wharf out to the navigable "water of a stream is given by Statute to any "owner of land within the corporate limits of "any town or city bordering thereon [Hill's "Ann. Laws Sec. 4227]. It must be conceded "that wharfage or wharfing privileges are val- "ueless unless they extend to navigable water "or the ship's channel. It often happens that

"the contour or configuration of a stream is "such that if the dividing line of upland own- "ers bordering on the margin or line of high "water mark is extended by right angles, the "owner on one side thereof will be deprived of "access to the ships channel; so that, in order "to accord to each owner a ratable and equi- "table proportion of the navigable stream, the "rule has been firmly established * * * that "the bounds are to be governed by lines drawn "at right angles from the thread of the stream "to the shore termini. * * * * The thread "of the stream is the unalterable base from "which lines drawn at right angles to the "shore termini will determine the area subject "to the exercise of the wharfing privilege."

It appears in this case [Trans. pages 68, 80, 81, 82, that some years before the commencement of this suit, the Standard Oil Company constructed a wharf or ware house known as the "Oil House" within the side lines of its property adjoining that of appellee E. A. Anderson, on the north [See exhibit "L" and "3"]. It is immediately south of this building and within the side lines of appellee's property extended to navigable water that the appellant drove piling on a Saturday night and a Sunday in the winter or spring of 1907, [Trans. pages 66 and 76]. This was done without the consent of the appellees.

It is clear from the testimony [Trans. pages 53 to 61] and from exhibits "L" and "3", that this piling was not driven within the space where it was permissible for appellant to drive piling and build wharves. Thus driven, the piling was an obstruction which would prevent appellees from having access to the

navigable water in front of their lands.

Other cases bearing upon this phase of the question are

Jones vs. Johnson, 59 U.S. 150.

Dutton vs. Strong, 1 Black [U.S. 1]

Rumsey vs. N.Y.& N.E.R.R.Co., 133 N.Y.78.

Farnham on Water and Water Rights, Sec. 874, pages 2543-2555.

POINT III.

Appellees' Paramount Right to Use the Space in Front of Their Land for Access to Deep Water is an Easement or a Right Appurtenant to the Upland and Cannot be Taken from Them Without Their Consent or Without Compensation and Cannot in any Event be Taken from Them for a Private Use.

In Farnham on Water and Water Rights, Sec. 113 p. 529, it is said:

> "The primary use of the waterway is that "of commerce, and the principal aid to com- "commerce is that of navigation, and the "wharves and piers are only adjuncts to that "right and can never be erected so as to ob- "struct or interfere with it. Likewise, with "reference to adjoining owners, each owner "must exercise his own rights in such a way "as not to impair the equal rights of his neigh- "bors. He must, therefore, keep his wharf "or pier in front of his own property and not "construct it in such a way as to prevent the "adjoining owner from wharfing out or so as "to cut off access to his property."

See also Farnham on Water and Water rights, Sec. 873, p. 2541.

In Lewis vs. City of Portland, 25 Oregon, 133-169. the Court says on pages 168 and 169:

> "The right to build and maintain a wharf, "being in aid of navigation and for the bene-"fits of commerce, rests upon a different foot-"ing and principal from a license to erect mills "with dams, which may impede or obstruct "navigation or canals diverting the waters of "a navigable river.
>
> "Without further reference, it is sufficient "to say that we think the plaintiffs have a "right of property in their wharf of which "they cannot be deprived except in accord-"ance with established law, and if it should "be necessary that it be taken or destroyed for "the use of a bridge, that it cannot be done "without due compensation therefor." [Citing Monongahela Nav. Co. vs. U. S. 148 U.S. 312]

In Rumsey vs. N. Y. & N. E. R. R. Co., 133 N. Y. 78, the Court, quoting from Yates vs. Milwaukee, 10 Wall. 497 says:

> "This riparian right is property and is val-"uable and though it must be enjoyed in "proper subjection to the rights of the public, "it cannot be arbitrarily or capriciously des-"troyed or impaired. It is a right of which "when once vested, the owner can only be de-"prived in accordance with established law. "and if necessary that it be taken for public "good, upon due compensation."

In Janesville vs. Carpenter, Wis. 20 Am. St. Rep. 23, the Court, speaking of the riparian owner, says:

> "Subject to these restrictions, he has the "right to use his land under water the same "as above water. It is private property under "the protection of the Constitution and it can-

> "not be taken or its value lessened or impaired,
> "to have for 'public use' without compensa-
> "tion or without due process of law, and it
> "cannot be taken at all for any ones private
> "use."

In the case at bar the appellant had no permission from the appellees to drive the piling or construct any wharf or pier and as soon as the appellees were aware of what was being done, they stopped the work [Trans. p. 76]. Although appellant attempted by its answer to set up the defense of prescriptive use and adverse possession for more than ten years, no attempt was made to maintain this defense.

The conduct of appellant was an apparent attempt to appropriate property belonging to appellees without making or offering to make any compensation therefor or attempting to first establish a right to take it for a public use.

In Farnham on Water and Water Rights, Sec. 873, p. 2542, it is said:

> "The right of constructing wharves *is a*
> "*right appurtenant to the upland* and may there-
> "fore. be lost to upland owners by prescrip-
> "tion."

As already noticed, the appellant set up a claim of occupation and prescriptive user of the property for the statutary period as one of its defenses but offered no testimony to substantiate such defense. The testimony clearly shows that appellees and their predecessors in interest occupied the space where appellant attempted to construct a wharf within five or six years prior to the commencement of this suit.

[See Trans. pages 70, 71, testimony of George Rhoda].

POINT IV.

An Injunction is the Proper Remedy Where the Riparian Owner Has Good Reason to Apprehend That a Defendant is About to Encroach Upon his Right of Easement in Such a Manner as to Cause Him Irreparable and Material Injury and Cut Off his Access to Navigable Water.

In Parker vs. Taylor, 7 Oregon, 423, the Court says: pages 422-443.

> "The questions presented in the complaint "are matters within the jurisdiction of a Court "of equity. The complaint shows that the "respondent is the owner of land immediately "above high water and of the adjoining tide "lands and claims that he has a right to build "a wharf or wharves on these lands and to ex- "tend them beyond low water, and that he "threatens to continue and maintain these "construction and continue to interfere with "respondent's use of this property, and asks "for an injunction to restrain appellant from "the continuance of these unlawful acts. "Welch being the owner of the shore, has, by "the law of the State, a right to build a wharf "or wharves on the land in question and re- "claim it from the water. This he cannot do "unless Taylor is enjoined from placing ob- "structions in the way of his contemplated im- "provement. It is the threatened interference "with the future enjoyment of Welch's fran- "chise that he complains of and asks to be "protected against by injunction. This an "action of trespass or for a nuisance could not "reach, *and the proper remedy is by an injunc- "tion.*"

It seems to be the general rule that the enjoyment of an easement will be protected by an injunction.

See Kittle vs Pfeifer, 22 Cal. 484.

Stallard vs. Cushing, 76 Cal. 472.

Lathrop vs. Elsner, 93 Mich. 599.

Vestal vs. Young, 147 Cal. 721.

Appellee Anderson testifies (Trans. p. 76) that he purchased Lot 16 in Block 65 of Nasburg's or Bennett's Addition with the understanding that he was to use it as a coal yard for the reason that the dredgings were interfering with access to other lands which he owned. In 1907 he was informed that piles were being driven in front of his property without his consent. The lots are principally valuable for their water front and the effect of the piling driven by the appellant would be to shut appellees off from deep water (Trans. p. 77). He further testifies (Trans. p. 78) that he could not use his property for the purpose he intended and that the piling was driven in front of his property pretty close to the ships channel; that his lot and the lot adjoining belong to appellee Herron is valuable as ware house property and that the ship channel passing these lots is the main ships' channel to the sea.

From all the testimony it seems there can be no question about appellee's property being water front property and that it is valuable because it is so situated as to have access to the navigable waters of Coos Bay. The ship's channel to the sea runs directly in

front of the property and appellee Anderson purchased his lot for the express purpose of using it for a coal yard and because there he could land a coal scow. Appellant surreptitiously and in the night time and on a holiday sent in its men and machinery and drove piling in considerable quantity and with the apparent purpose of using the space directly in front of appellee's land for the building of a wharf or some landing place or structure [Trans. p. 66]. This was clearly an interference with appellee's right or easement and shut them off from all access to the ships channel and the navigable waters of Coos Bay. Appellant admits in its answer [Trans. p. 41] that it drove the piling claiming the right to do so. From the pleadings and all the testimony and the exhibits, there can be no doubt as to the location of the piling driven by the appellant in front of appellee's property. Appellant moreover asserts its right to build a wharf in the place where the piling was driven. Appellees respectfully submit that this is a case where they have no speedy or adequate remedy at law and that an injunction is the proper remedy. The threatened irreparable injury to appellee's easement and interference with their right to wharf out is an injury which should be prevented and in this case was properly prevented by a permanent injunction. This case is so similar to the case of *Parker vs. Taylor*, *7 Oregon*, *324*, from which we have cited above, that we fail to see where there is any merit in appellant's first specification of error.

POINT V.

It Was a Question of Fact to be Determined by the Trial Court Whether Appellant's Property as Described in Its Deed Lay in Front of Appellee's Lots and This Fact could be Proved by any Evidence Competent to Prove Any Fact, Even by Parole Evidence.

Appellant seems to rely principally upon the proposition that this suit is based upon a dispute over certain boundary lines and that the Court lacked jurisdiction to grant injunctive relief and finds fault with the manner in which the location of appellee's and appellant's land was determined. (See Trans. p. 101.)

The Court found as a fact that the equities were with the appellees and that they were entitled to the relief prayed for in their complaint and enjoined the appellants from driving any poles or posts or erecting any structure in front of or within the space comprised by the laterals extended to the ships channel of appellee's lots, or in any way obstructing, occupying or encroaching upon the space between said lots and the ships channel on the navigable waters of Coos Bay. If, from all the evidence, it appeared as matter of fact that no portion of appellant's property lies in front of appellee's lots then the trial Court had jurisdiction to and properly did grant the injunction prayed for. It is too late to controvert the proposition that what constitutes the boundary in a deed is a fact for the jury and may be proved by any kind of evidence, which is competent to prove any

fact and that parole evidence is permissible to fix a boundary.

Raymond vs. Coffey, 5 Oregon, 132-134.

Blake vs. Doherty, 5 Wheaton, (U.S.) 359-370.

Shaver vs. Adams, 37 Ore. 282-286 (60 Pac. 902)

City of Racine vs. Emerson, 85 Wis. 80 (39 Am. St. Rep. 819).

Boehreinger vs. Creighton, 10 Oregon, 42. 2 Am. & Eng. Ency. of Law, 1st Ed. p. 501.

The testimony shows, as a fact, that the land owned by the appellant does not extend in front of the land owned by the appellees at any point except at extreme low tide where about five or six feet only extends in front of Lot 17. The point of intersection of appellant's westerly line with the line of mean low tide of Coos Bay is wholly without the space in front of appellee's lots, (See testimony of S. B. Cathcart, Tran. pages 53, 54, 55) and Exhibit "L" and also testimony of A. N. Gould, (Trans. pages 62, 63 and 64) and Exhibit "3". These exhibits are plats that were made by the surveyors from actual measurement and surveys made upon the ground, and Exhibit "3" is a true plat of the land in dispute.

It appears also from the testimony of Mr. J. W. Bennett (Trans. pages 71-74) that there has been no change in the tide lines since the survey of the original plat. It will be observed from an examination of the plats that appellant's land is described as commencing at the northeast corner of Lot 6 in Block 5

of the town of North Marshfield, Coos County, Oregon according to the plat of said town prepared by James Aiken (Trans. p. 42) and it will be observed that by this description the appellant itself must rely upon the location of the northwest corner of said lot 6 in order to establish the boundary of its property. The testimony further shows that the only ascertained and certain point from which a survey could start was the southeast corner of the Marks Building at the southeast corner of Block 8 in North Marshfield (Tran. pages 60, 89 and 90). There was nothing by which the survey could be connected with any Government survey (Trans. p. 91). This brings us naturally to the question of the location of appellant's westerly line and the manner of its determination.

POINT VI.

Any Ascertained Monument in the Survey May be Adopted As a Starting Point and the Location Thereof Established by Parole Evidence.

2 Am. & Eng. Ency. of Law, (1st Ed) p. 501.
Ayers vs. Watson, 137 U. S. 584.
Racine vs. Emerson, 85 Wis. 80 (39 Am. St. Rep. 819)
Boehreinger vs. Creighton, 10 Oregon 42.
Terris vs. Coover, 10 Cal. 624.
Colton vs. Seavey, 22 Cal. 497.
Raymond vs. Coffey, 5 Oregon, 134.
Orena vs. City of Santa Barbara, 91 Cal. 621.

It appears from the testimony that soon after the surveying and platting of North Marshfield, a building was constructed by one F. Mark at the southeast corner of block 8 [Trans. p. 85]. Piles were driven for the foundation of this building and John Bear who was living at Marshfield at the time the survey was made, says that the southeast corner of the Marks building [Trans. p. 87] is right on the corner. That corner has been recognized as the true corner of said block ever since the platting of the town. Mr. Cathcart, in correcting his testimony above referred to [Trans. p. 89] explains that he made other surveys and that the corner of the Marks Building was always recognized as the true corner of the block.

In Orena vs. City of Santa Barbara, 91 Cal. 621, certain surveyor's stakes marking street corners had disappeared. In discussing the question as to the location of street lines, the Court says:

> "But the initial point and base-line, if they "had been marked on the map, and returned "in the notes of the survey, instead of existing "only in the memory of the surveyor, as they "did in this case, would not be necessarily "more controlling than other ascertained "points in the survey in ascertaining the ac- "tual location of streets and blocks; whether "the initial point be of greater or less import- "ance than other ascertained points, would "depend on circumstances, their proximity "and relation to the point to be located.
>
> "In determining the line of the street, meas- "urements on that street would naturally be "of more value than elsewhere, and if they,

> "or the places where they were, cannot be lo-
> "cated, it would be important to ascer-
> "tain the boundaries of the street as
> "actually opened and used; and if such loca-
> "tion has been generally acquiesced in by the
> "public. by lot-owners and the municipality,
> "in the absence of more certain evidence, it
> "will be conclusive."

Appellant objects to the introduction of the plats and the testimony of the surveyors for the reason, among other things. that the survey did not start from the original point. Appellees contend that the cases just cited and the authorities mentioned under Point V. above, settle this point.

It was held in Black vs. Doherty, 5 Wheaton [U.S.] 359 [see particularly page 370] and the other authorities cited under Point V. above, that it is too late to controvert the proposition that what constitutes a boundary in a Deed is a fact for the jury and may be proved by any kind of evidence which is competent to prove any fact and that parole evidence is permissible to fix a boundary.

In City of Racine vs. Emerson, 85 Wis. 80, the Court says:

> "Monuments set by surveyors in the ground
> "and named and referred to in the plat are the
> "highest and best evidence. If there
> "are none such, then stakes set by the survey-
> "ors to indicate corners of lots or blocks or the
> "line of streets at the time or soon thereafter,
> "are the next best evidence. The building of
> "a fence or building according to such stakes,

> "while they were present, become monuments "after such stakes have been removed or dis- "appeared, and the next best evidence of the "true line."

In Ralston vs. Miller, 3 Rand. 44 [15 Am. Dec. 704] it is said:

> "The ancient reputation of possession in re- "spect to the locations of streets is entitled to "more respect in determining the parole of "lines than in any experimental survey that "can be made."

We submit the testimony in this suit shows that the original survey stakes could not be located and that the southeast corner of the Marks Building was the southeas corner of the block from which the survey was started and that this corner has always been recognized as the true corner and starting point for all surveys made in the town of Marshfield for nearly forty years (Trans. pages 85 and 89).

The testimony of the surveyors as to the manner of making the survey and plats is the best evidence obtainable and is competent to prove the location of the true corners of the several blocks in North Marshfield and that the plats made from such surveys are entitled to due credit. (See the testimony of A. N. Gould who made the plat of North Marshfield and a portion of Bennett's Addition to Marshfield showing the location of the lands of appellant and appellees and the starting point for the survey (Tras. p. 94).

The survey of appellant's land made according to

the descriptions in appellant's Deed and commencing at the northwest corner of Lot 6 in Block 5 of the town of North Marshfield, located with reference to the established and recognized street lines and block boundaries of North Marshfield, clearly shows that the appellant's line does not extend to the point in front of appellee's lots where the appellants attempted to construct the wharf complained of.

We submit that the appellees were entitled to the injunction restraining the appellant, its agents and employees, from constructing the wharf in front of appellee's lots or in any way obstructing or encroaching upon the space between their lots and the ships channel on the navigable waters of Coos Bay.

Respectfully submitted,

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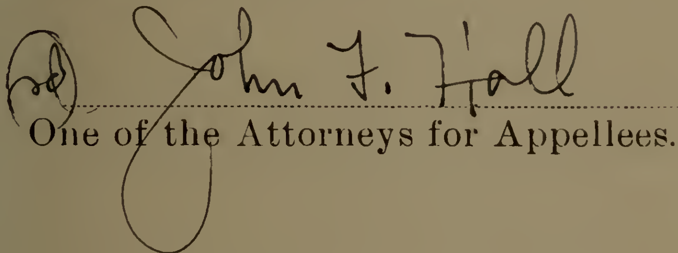
CERTIFICATE.

United States of America,
State of Oregon, } ss.
County of Coos.

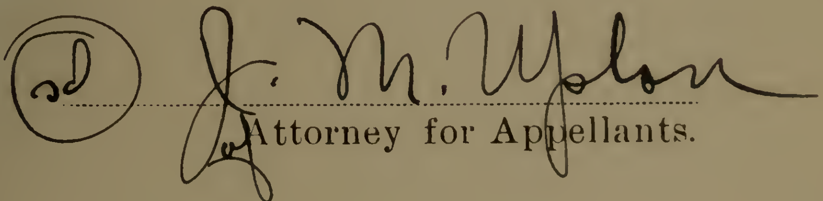
I hereby certify that the foregoing Brief is a true and correct copy of Appellees' Brief herein and of the whole thereof.



One of the Attorneys for Appellees.

ACKNOWLEDGEMENT OF SERVICE.

I hereby acknowledge service of Appellees' Brief in the within entitled cause on me in Coos County, Oregon, this . 27 . . day of ~~October,~~ September, 1912, by receipt personally of a duly certified copy thereof.



Attorney for Appellants.

No. 2196

United States
Circuit Court of Appeals
For the Ninth Circuit.

ASTORIA IRON WORKS, a Corporation, Intervenor,
Appellant,

vs.

INLAND NAVIGATION COMPANY, a Corporation, Claimant of the Gas Boat "BAINBRIDGE," Her Tackle, etc.,
Appellee.

Apostles.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

FILED
FEB 25 1913

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4429.

T. J. KING and A. WINGE, Doing Business as KING & WINGE,

Libelants,

vs.

Gas Boat "BAINBRIDGE," etc.,

Respondent.

ASTORIA IRON WORKS, a Corporation,

Intervenor.

INLAND NAVIGATION COMPANY, a Corporation,

Claimant.

Names and Addresses of Counsel.

C. C. DALTON, Esq., Proctor for Intervenor and Appellant.

432 Pioneer Bldg., Seattle, Washington.

HERBERT W. MEYERS, Esq., Proctor for Intervenor and Appellant.

432 Pioneer Bldg., Seattle, Washington.

IRA BRONSON, Esq., Proctor for Claimant and Appellee. [1*]

*Page-number appearing at foot of page of original certified Record.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4429.

T. J. KING and A. WINGE, Doing Business as KING & WINGE,

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vs.

Gas Boat "BAINBRIDGE," etc.,

Respondent.

ASTORIA IRON WORKS, a Corporation,

Intervenor.

INLAND NAVIGATION COMPANY, a Corporation,

Claimant.

Statement.

TIME OF COMMENCEMENT OF SUIT.

December 29, 1910.

NAMES OF PARTIES TO SUIT.

Intervening Libelant: Astoria Iron Works, a corporation.

Respondent: Gas boat "Bainbridge," etc., and Inland Navigation Company, a corporation, claimant.

DATES OF FILING RESPECTIVE PLEADINGS.

Intervening Libel, filed December 29, 1910.

Appearance of gasoline launch "Bainbridge" and Inland Navigation Company, a corporation, claimant, filed November 23, 1910.

Answer of the Inland Navigation Company, claimant, to the Intervening Libel of the Astoria Iron Works, filed April 1, 1911.

ISSUANCE OF PROCESS AND SERVICE THEREOF.

On December 29, 1910, issued Monition and Attachment against gas boat "Bainbridge," etc., and delivered the same to marshal for service. On the 31st day of December, 1910, marshal returned **[2]** the same into the clerk's office with return indorsed thereon showing seizure of the gas boat "Bainbridge," etc., and of the release thereof pursuant to Section 941, U. S. R. S.

REFERENCE TO COMMISSIONER.

Cause was referred to Commissioner A. C. Bowman to take and report the testimony, and on July 10, 1911, and February 13, 1912, said Commissioner duly returned into the clerk's office his transcript of the testimony so taken, together with the exhibit offered in evidence before said Commissioner, which said testimony and exhibit were duly filed in said cause on the 4th day of April, 1911.

TIME OF TRIAL.

This cause was submitted to the Honorable C. H. Hanford, Judge of the District Court, on testimony taken before a Commissioner and was by him taken under advisement and a Memorandum Decision on the Merits was handed down and filed June 13, 1912.

DATE OF ENTRY OF DECREE.

A Memorandum Decision on the Merits was filed in the District Court on June 13, 1912, and the De-

cree of Dismissal was made and entered and filed in said District Court on July 1, 1912, and Notice of Appeal was served August 14, 1912, and filed in the District Court October 24, 1912.

C. C. DALTON,
HERBERT W. MEYERS,
Proctors for Appellant. **[3]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4429.

T. J. KING and A. WINGE, Doing Business as KING & WINGE,

Libelants,

vs.

Gas Boat "BAINBRIDGE,"

Respondent.

ASTORIA IRON WORKS, a Corporation,

Intervenor.

Intervening Libel.

The intervening libel of the Astoria Iron Works, a corporation, against the gas boat "Bainbridge," her tackle, apparel and furniture, and against all persons lawfully intervening for their interests, in a cause of contract civil and maritime, and the said intervening libelant alleges and propounds as follows:

I.

That the said vessel is now in the port of Seattle,

in the District aforesaid, and is in the custody of the Marshal of the United States for the Western District of Washington, Northern Division, and is held upon process issued out of this Honorable Court at the suit of T. J. King and A. Winge, doing business as King & Winge, vs. the gas boat "Bainbridge," number 4429, which said action is still pending.

II.

That the intervening libelants are now and were at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business being in Astoria, Oregon, and said intervening libelants have complied with all the requirements [4] of law, and are entitled to do business in the State of Washington.

III.

That during the years 1909 and 1910, the Astoria Iron Works, intervening libelant herein, performed labor and furnished material at the request of and under contract with the owners, master and agents of the gas boat "Bainbridge," a domestic vessel, registered with the United States Custom Office, located at Port Townsend, Washington, for which said services and material there is a balance due of $3,020.30, no part of which has been paid, although demand therefor has been made. This work was done and the material furnished in the State of Washington, and was for the alteration, repair and equipment of said gas boat. Said work was done on board said vessel while she was lying in her home

port. The material furnished and the work done was done within less than three years, and those performing and furnishing the same relied on the assurances of the owners and their agents, and at the time they believed that they could hold the said gas boat "Bainbridge" for said work and material.

Wherefore, the libelant prays that they may be permitted to intervene according to the course and practice of the courts of Admiralty and Maritime Jurisdiction, against the said gas boat "Bainbridge," her tackle, apparel and furniture, and prosecute same jointly with the said T. J. King and A. Winge, doing business as King & Winge, and that all persons having or pretending to have any right, title or interest, may be cited to appear and answer all and singular the matters hereinbefore set forth, and that this Honorable Court will be [5] pleased to decree the payment of the amount aforesaid, and also to condemn and sell the said vessel, her tackle, apparel and furniture, to pay the same, with costs and for such other relief as may be proper in the premises.

ASTORIA IRON WORKS.
By JOHN FOX,
President.

C. C. DALTON,
HERBERT W. MEYERS,
Proctors for Intervening Libelant.

State of Oregon,
County of Clatsop,—ss.

On this 12th day of December, 1910, before me personally came the within named John Fox, Pres-

ident of the Astoria Iron Works, and made oath that he had read the foregoing intervening libel, and knows the contents thereof, and that the same is true as to his own knowledge, except as to those matters and things stated to be on his information and belief, and as to those matters and things he believes them to be true.

JOHN FOX.

Subscribed and sworn to before me this 12th day of December, 1910.

[Seal] G. C. FULTON,

Notary Public in and for the State of Oregon, Residing at Astoria, in Clatsop County.

My commission expires Dec. 27, 1910.

[Indorsed]: Intervening Libel. Filed in the U. S. District Court, Western Dist. of Washington. Dec. 29, 1910. R. M. Hopkins, Clerk. **[6]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4429.

T. J. KING and A. WINGE, Doing Business as KING & WINGE,

Libelants,

vs.

Gas Boat "BAINBRIDGE,"

Respondent.

ASTORIA IRON WORKS, a Corporation,
Intervenor.

INLAND NAVIGATION COMPANY, a Corporation,
Claimant.

Answer.

Comes now the claimant, Inland Navigation Company, and in answer to the libel in intervention of the Astoria Iron Works, alleges as follows:

I.

Referring to paragraph two thereof, this claimant denies that it has any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations therein contained, and therefore denies the same.

II.

Referring to paragraph three thereof, this claimant denies each and every allegation, matter and thing therein contained; and particularly denies that there is a balance due of $3,020.20, or any other sum of money whatsoever.

Wherefore, this claimant having fully answered the libel in intervention of said Astoria Iron Works respectfully prays that it may be hence dismissed and have and recover its costs and disbursements herein.

IRA BRONSON,
Proctor for Claimant. [7]

United States of America,
State of Washington,
County of King,—ss.

C. H. J. Stoltenberg, being first duly sworn, on oath deposes and says: That he is the Secretary of the Inland Navigation Company, a corporation, claimant herein; that he has read the foregoing Answer, knows the contents thereof and believes the same to be true.

C. H. J. STOLTENBERG.

Subscribed and sworn to before me this 17th day of January, 1911.

[Seal] ROBERT W. REID.

Notary Public in and for the State of Washington, Residing at Seattle.

Due service of a copy hereof admitted this 18th day of January, 1911.

HERBERT W. MEYERS,
C. C. DALTON,
Attorneys for Astoria Iron Works.

[Indorsed]: Answer to Libel in Intervention of Astoria Iron Works. Filed in the U. S. District Court, Western Dist. of Washington, Apr. 1, 1911. R. M. Hopkins, Clerk. [8]

[Findings and Conclusion of U. S. Commissioner.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4429.

T. J. KING and A. WINGE, Copartners, Doing Business as KING & WINGE,

Libelants,

vs.

Gas Boat "BAINBRIDGE," etc.,

Respondent.

INLAND NAVIGATION COMPANY, a Corporation,

Claimant.

ASTORIA IRON WORKS, a Corporation,

Intervenor.

To the Honorable Judges of the Above-entitled Court:

Having taken the proofs offered by the several parties to the above-entitled cause and after considering the same, I submit the following:

FINDINGS OF FACT.

I.

That at all times herein mentioned the respondent, the gas boat "Bainbridge" was an American vessel, plying on the waters of Puget Sound and within the jurisdiction of this Honorable Court.

II.

That the libelants T. J. King and A. Winge are

copartners, doing business under the firm name of King & Winge.

III.

That the libelants, between the 25th day of September, 1908, and the 23d day of February, 1910, at the special instance and request of the owners and agents of the respondent gas boat "Bainbridge," furnished labor and material in and about the repair of said gas boat, of the reasonable value of $1,011.35. [9]

That upon said account there has been paid by the owners of said respondent the sum of $811. That there is now due and owing to said libelant on account of said labor and material from the said respondent and owners the sum of $200.35.

IV.

That it was agreed between the libelants and the owners of the said respondent "Bainbridge" that the said labor and material should be furnished and performed upon the faith and credit of said respondent "Bainbridge."

V.

That the intervenor the Astoria Iron Works is a corporation organized and existing under the laws of the State of Oregon and authorized to do business in this State.

VI.

That said intervenor, at the special instance and request of the owners of the said "Bainbridge," furnished certain gas engines and fixtures which were installed in the said gas boat "Bainbridge," of the reasonable value of $3,550, and also furnished

extra material and labor amounting to $189, making a total sum of $3,739, no part of which sum has been paid except the sum of $1,000, leaving a balance due and owing of $2,739.

VII.

That no agreement was made between the intervening libelant and the owners of said respondent that said engines, fixtures and labor should be performed on the faith and credit of the said "Bainbridge."

CONCLUSION OF LAW.

I.

That the libelants King & Winge are entitled to a lien against the respondent "Bainbridge" in the sum of $200.35, together with their **[10]** costs and disbursements.

Respectfully submitted,

[Seal] A. C. BOWMAN,
U. S. Commissioner.

[Indorsed]: Findings of Fact by U. S. Commissioner. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 13, 1912. A. W. Engle, Clerk. By S., Deputy. **[11]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4429.

T. J. KING and A. WINGE, Doing Business as KING & WINGE,

Libelants,

vs.

Gas Boat "BAINBRIDGE,"

Respondent.

ASTORIA IRON WORKS, a Corporation,

Intervenor.

Order [Permitting Astoria Iron Works to Intervene, etc.].

This matter coming on for hearing this —— day of December, 1910, and the Court being duly advised in the premises, it is;

Ordered, adjudged and decreed that the Astoria Iron Works, a corporation, has permission to intervene in the cause wherein King & Winge are libelants, and the gas boat "Bainbridge" is respondent, and the intervenor, the Astoria Iron Works, has permission to file its intervening libel.

C. H. HANFORD,

Judge.

[Indorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington. Dec. 29, 1910. R. M. Hopkins, Clerk. **[12]**

[Order Referrring Matter Back to U. S. Commissioner for Taking of Further Testimony in Behalf of Libelant.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4429.

T. J. KING and A. WINGE, Partners, Doing Business as KING & WING,

Libelants,

vs.

Gas Boat "BAINBRIDGE," etc.,

Respondent.

ORDER OF REFERENCE.

Now on this 2d day of October, 1911, this matter coming on to be heard upon the application of the proctor for the libelants for an order referring the above-entitled matter back to the United States Commissioner for the taking of further testimony on behalf of libelants, and the Court having read the Stipulation herein on file between the proctors for the parties herein providing for same;

It is hereby ordered that the above-entitled matter be and it is referred back to the United States Commissioner, A. C. Bowman, for the taking of further testimony in behalf of libelants.

C. H. HANFORD,

Judge.

[Indorsed]: Order of Reference. Filed in the U. S. District Court, Western Dist. of Washington,

Oct. 2, 1911. A. W. Engle, Clerk. By F. A. Simpkins, Deputy. [13]

United States District Court, Western District of Washington, Northern Division.

No. 4429.

T. J. KING and A. WINGE, Copartners, Doing Business as KING & WINGE,

Libelants,

vs.

Gas Boat "BAINBRIDGE," etc.,

Respondent.

INLAND NAVIGATION COMPANY, a Corporation,

Claimant.

ASTORIA IRON WORKS, a Corporation,

Intervenor.

Memorandum Decision on the Claim of the Astoria Iron Works.

Filed ———.

The Astoria Iron Works, a corporation, has intervened in this case and by pleadings and evidence endeavored to establish a lien against the "Bainbridge" for a new engine and fixtures and extra labor and materials furnished in making repairs and improvements to said vessel, at her home port. The amount of the claim has been established, but the evidence fails to prove that there was any agreement or understanding or consent on the part of the owner of the boat required to subject the vessel to

a lien under the rule established by the decision of the Circuit Court of Appeals for this Circuit in the case of Alaska & P. S. S. Co. v. C. W. Chamberlain, 116 Fed. Rep. 600. Therefore, the claim being older than the national lien statute of 1910, the Court is constrained to disallow the claim.

C. H. HANFORD,
United States District Judge.

[Indorsed]: Memorandum Decision on the Claim of the Astoria Iron Works. Filed in the U. S. District Court, Western Dist. of Washington, June 13, 1912. A. W. Engle, Clerk. By S., Deputy. [14]

United States District Court, Western District of Washington, Northern Division.

No. 4429.

T. J. KING and A. WINGE, Copartners, Doing Business as KING & WINGE,
Libelants,

vs.

Gas Boat "BAINBRIDGE," etc.,
Respondent.

INLAND NAVIGATION COMPANY, a Corporation,
Claimant.

ASTORIA IRON WORKS, a Corporation,
Intervenor.

Decree of Dismissal.

This cause coming on to be heard on this ——

day of June, 1912, upon the motion of the claimant, The Inland Navigation Company, a corporation, for the entry of a decree dismissing the intervening libel of the intervenor, Astoria Iron Works, a corporation, and it appearing that this cause was heard upon the pleadings and proofs, and after argument of counsel for the respective parties, the Court entered its memorandum decision finding that the evidence failed to prove that there was any agreement or understanding or consent on the part of the owner of the "Bainbridge" required to subject said vessel to a lien, and disallowing the claim of said intervenor.

It is now ordered, adjudged and decreed by the Court that the intervening libel of the Astoria Iron Works, a corporation, intervenor, be, and the same is hereby dismissed.

It is further ordered and decreed that the claimant, The Inland Navigation Company, a corporation, recover from said intervenor, Astoria Iron Works, a corporation, its costs herein to be taxed.

Done in open court this 1st day of July, 1912.

C. H. HANFORD,
Judge. [15]

Due service of a copy hereof admitted this 20th day of June, 1912.

HERBERT W. MEYERS.
C. C. DALTON.

[Indorsed]: Order of Dismissal. Filed in the U. S. District Court, Western Dist. of Washington, July 1, 1912. A. W. Engle, Clerk. By S., Deputy. [16]

No. 4429.

KING & WINGE, Libelants, and ZUGEHOER, et al., Intervenors,

vs.

The Gas Boat "BAINBRIDGE," etc., Respondent.

Testimony Reported by Commissioner. [17]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4429.

T. J. KING and A. WINGE, Doing Business as KING & WINGE,

Libelants,

vs.

Gas Boat "BAINBRIDGE," etc.,

Respondent.

Libelants' Testimony.

To the Honorable Judge of the Above-entitled Court:

Pursuant to the order of reference in this case, on this 30th day of December, 1910, the libelants appeared in person and by Mr. Daniel Landon, their proctor, and the claimant appeared by Mr. Ira Bronson, its proctor, before me, and the following proceedings were had and testimony offered:

[Testimony of A. Winge, for Libelants.]

A. WINGE, one of the libelants, being duly sworn, testified on behalf of the libelants as follows:

Q. (Mr. LANDON.) You are one of the firm of King and Winge the libelants in this case?

(Testimony of A. Winge.)

A. Yes, sir.

Q. State what you did, if anything, on the "Bainbridge."

A. We hauled her out in our yard, and side tracked her in the winter of 1908. And after she had been staying there some time, I don't know how long, he decided to put a new engine in the boat. She had two engines in her and he wanted to put just one engine in her, and strengthen up the boat with keelsons in the skag and bore a hole—in fact he wanted us to do all the work and fix the guards, etc., and the house, and several [18] things you know, around the boat, which we did. And, towards spring I went after him for some money, and he paid us some, and we thought they would have a good run and would pay us right along. Well, I told him then, I says, "Of course, we need the money," and, "Well," he says, "you will get it; you need not be afraid about the money; the boat is good for the work," so we let it go at that. And we hauled her up several times, I don't know how many after that, for minor repairs, such as painting. One time he broke his wheel and had to haul her out. And he paid us most of it, except there is a balance of $235 that he has not paid, and that is what we would like to get.

Q. You speak about the party in charge; who was he?

A. I don't know his first name. His name was Munk. He used to be with the Sailors' Institute. He was the managing owner of the boat. His partner was also there. He was working on it. I do not

(Testimony of A. Winge.)

remember his name.

Q. Just generally, if you remember, what, if anything, was said at the time you made the repairs on the boat?

A. Well, it was mentioned, as I said, that he would pay as soon as they could make the—they had a good run they would pay pretty quickly, and he said that we need not worry about the money, the boat is good for it.

Q. What was the amount?

A. The amount at that time I do not exactly remember, but the whole amount was about $1,011.75, I think. That is the amount that was on all the times we hauled her out.

Q. What are you suing for?

A. We are suing for the balance we have not got. [19]

Q. How much is that? A. That is $200.35.

Q. Where was the boat at the time the repairs were made?

A. In our yard, sidetracked over on the flats there.

Q. State whether or not it was where the tide ebbed and flowed, or was it not?

A. Well, the tide went, high tides went up just about half of her, where she was standing, the big tides.

Q. And how about when she was in your runway or on your ways, how are your ways?

A. The tide goes up underneath her, you know. That is the high tides. Of course, part of it is dry,

the front part is dry and the aft part is under the water.

Mr. LANDON.—That is all.

Mr. BRONSON.—No cross-examination.

Hearing adjourned, to be resumed by agreement.

[Indorsed]: Testimony reported by Commissioner of Libelants King & Winge. Filed in the U. S. District Court, Western Dist. of Washington. July 10, 1911. R. M. Hopkins, Clerk. [20]

Intervenor Astoria Iron Works Testimony.

Seattle, Washington, June 7, 1911.

Continuation of proceedings.

Present: Mr. DALTON, One of Proctors for Intervenor Astoria Iron Works.

Mr. BRONSON, for the Claimant.

Mr. LANDON, for King & Winge.

[Testimony of John Fox, for Intervenor.]

JOHN FOX, a witness for the above intervenor, being duly sworn, testified as follows:

Q. Mr. Fox, where do you reside?

A. Astoria, Oregon.

Q. Are you connected with the Astoria Iron Works, the intervening libelant? A. I am.

Q. What position do you hold with the Astoria Iron Works? A. President of the company.

Q. Do you know the Sound Motor Company, a corporation, of Seattle, Washington?

A. Yes, sir, I done some business with them.

Q. Do you know the gas boat "Bainbridge," of Seattle, Washington? A. Yes, sir.

(Testimony of John Fox.)

Q. During the year 1909, did your company furnish any material or make any repairs or any alterations of the gas boat "Bainbridge"?

A. Furnished them an engine and outfit complete.

Q. What did the engine and outfit complete consist of, in a general way? Tell us some more about it.

A. Well, it consisted of a four cylinder, seventy-five horse-power engine complete, with shaft, propeller, [21] stuffing-box, stern-bearing, pipes, etc. In fact, we installed the engine in the boat complete and made a trial trip of it. That is with whistle air tacks, etc., except the oil tanks.

Q. State whether or not the boat had other engine equipment in prior to this time.

A. Yes, she had two forty horse-power engines prior to this, and they took them out and we put in the 75 horse-power in place of them.

Q. That is two single engines, what would you call them, twin screw?

A. Twin propeller engines, twin screw engines they are called.

Q. What amount was the value of installing of and the furnishing of this engine and equipment complete, and installing it in the boat?

A. $3,500 was the amount.

Q. Was there any amount paid to you on that?

A. Yes, they paid with the order $500 and paid $500 later after the engine arrived, a total amount of $1,000, I believe.

Q. After you had this work on the boat, after the

(Testimony of John Fox.)

engine was installed, was there any other work performed upon her by your company?

A. Yes. They broke a propeller and they broke a strut, and we furnished a propeller and strut. That was outside of the contract.

Q. How much did that amount to?

A. The books show one hundred eighty-nine dollars and some cents. I do not recollect the exact amount. **[22]**

Q. So the amount of $3,550 was the value of the services and machinery agreed upon between you and the Sound Motor Company?

A. It was, yes, sir.

Q. Who did you do your business with, Mr. Fox, as far as the Sound Motor Company was concerned?

A. Mr. Munk, President of the company. S. S. Munk, I think, it is.

Q. Where was the vessel at this time you performed these services and put the engine in the boat, etc.?

A. I believe it was hauled out at King & Wing's. Hauled out somewhere. I think that was over there. I never seen the boat at all until after the engine was in.

Q. Where are King & Wing's?

A. West Seattle. I am not positive as to that, but that is my understanding. She was laid up, I know, at the time they had trouble with the engines.

Q. State whether or not in the furnishing of the material that you have testified and the work performed on the vessel in placing the engine equip-

(Testimony of John Fox.)

ment in the vessel whether or not you depended upon the credit of the vessel for payment.

A. Any time we furnish anything for any vessel we always hold the vessel, that is, we bill to the vessel and hold the vessel for the repairs.

Q. Well, at the time that you agreed to furnish the machinery and perform these services as you testified to, did you have any understanding of any kind with the Sound Motor Company as to holding the vessel for the payment of the amount in case it was not paid? **[23]**

A. No, I did not have any understanding to hold the vessel; it was not mentioned. I did not mention it. But it was understood that we were to hold the engine until the final payment was made, but there was nothing said about holding the vessel as I remember.

Q. Was the Sound Motor Company the owner of the vessel at that time? A. Yes, sir.

Cross-examination.

Q. (Mr. BRONSON.) The King & Winge shipyard over here at West Seattle, was that where she was? A. Yes, I believe so; yes.

(Testimony of witness closed.)

[Stipulation That "Bainbridge" is an American Vessel and was in Harbor at Time Libel was Filed.]

It is stipulated that at the time of filing the libel in this case that the "Bainbridge" was in the harbor of Bellingham, within the jurisdiction of this court.

Also that the said "Bainbridge" is an American vessel.

Hearing adjourned. [24]

Seattle, July 10, 1911.

Present: Mr. MILLION, for the Intervenors Zugehoer and Johannson.

Mr. BRONSON, for the Claimant.

[Admission That Claimant was Ignorant of Claims or Liens Against "Bainbridge," etc.]

It is admitted by Mr. E. C. Million, proctor for the intervenors Zugehoer and Johannson, that the claimant in this case knew nothing of any claims or liens against the "Bainbridge" at the time they purchased the vessel, if said admission is material or relevant to the issues in the case.

Testimony closed. [25]

[Commissioner's Certificate to Testimony, etc.]

United States of America,
Western District of Washington,
Northern Division,—ss.

I, A. C. Bowman, a Commissioner of the United States District Court for the Western District of Washington, Northern Division, residing at Seattle, do hereby certify that

The foregoing transcript from page 1 to page 26, inclusive, contains all the testimony offered by the parties to the foregoing entitled cause before me. That I heard the testimony on the dates shown in the transcript.

The several witnesses, before examination, were by me duly sworn to testify the truth, the whole truth, and nothing but the truth.

Proctors for the parties stipulated waiving the reading and signing of the testimony given by said witnesses.

The exhibits offered appear in the index and are returned by me herewith.

I further certify that I am not of counsel nor in any way interested in the result of this suit.

Witness my hand and official seal this 10th day of July, 1911.

[Seal] A. C. BOWMAN,
U. S. Commissioner. [27]

COMMISSIONER'S TAXABLE COSTS.

Libelants:

Hearing Dec. 10, 1910	$3.00
Oath to 1 witness	.10
Transcript above hearing, 10 folios	1.00
	$4.10

Intervenors Zugehoer and Johanson:

Hearings March 25, April 4, 1911	6.00
Oaths to 2 witnesses	.20
Filing 1 exhibit	.10
Transcript above hearings, 45 folios	4.50
	$10.80

Intervenor Astoria Iron Works:

Hearing June 7, 1911	3.00
Oath to 1 witness	.10
Transcript above hearing 15 folios	1.50
	$4.60

Claimant's:

Hearing April 4, 1911	3.00
Oath to 1 witness	.10
Transcript above hearing 5 folios	.50
	$3.60

[Indorsed]: Testimony Reported by Commissioner. Filed in the U. S. District Court, Western Dist. of Washington. July 10, 1911. R. M. Hopkins, Clerk. **[28]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4429.

T. J. KING and A. WINGE, Doing Business as KING & WINGE,

Libelants,

vs.

Gas Boat "BAINBRIDGE," etc.,

Respondent.

INLAND NAVIGATION COMPANY, a Corporation,

Claimant.

ASTORIA IRON WORKS, a Corporation,

Intervenor.

Libelants' Additional Testimony.

To the Honorable Judges of the Above-entitled Court:

This cause having been re-referred to me on the 22d of January, 1912, the libelants appeared before me by Mr. Daniel Landon, the claimant by Mr. Ira Bronson and the intervenor by Mr. C. C. Dalton, on this 1st day of Febuary, 1912.

Thereupon the following testimony was offered and proceedings had:

[Testimony of A. Winge, for Libelants (Recalled).]

Mr. A. WINGE, one of the libelants, being recalled, testified as follows:

Q. (Mr. LANDON.) Where was the "Bainbridge" during the time you were performing services upon her? A. On our ways.

Q. Where was she before, was she in Puget Sound or Elliott Bay? A. Yes, sir.

Q. What was her condition, was she a boat that was in commission or otherwise?

A. She was in commission. **[29]**

Q. And these repairs, were they for the purpose of repairing her so that she would be in running order—to assist her in navigation?

A. Yes, certainly. It was repairs on her and improvements.

Q. Do you know whether or not she is an American vessel? A. Sure, she is an American vessel.

Q. And at the time she was libeled, where was she?

A. I could not say where she was; she was down Sound somewheres.

(Testimony of A. Winge.)

Q. She was somewhere on Puget Sound?

A. Yes, sir.

(No cross-examination.)

Testimony of witness closed.

Mr. DALTON.—I did not show in my testimony that she was an American vessel.

Mr. BRONSON.—I suppose she was. She must have been.

Testimony closed. [30]

[Commissioner's Certificate to Additional Testimony.]

United States of America,
Western District of Washington,
Northern Division,—ss.

I, A. C. Bowman, a Commissioner of the United States District Court for the Western District of Washington, residing at Seattle in said District, do hereby certify that the foregoing transcript, consisting of two pages, contains all of the testimony offered before me on the re-reference of said cause, said order being dated January 22, 1912.

The stipulation heretofore entered in said cause waiving the reading and signing of the testimony of the witnesses was renewed and applied to this hearing.

And I certify that the testimony set forth herein is the testimony given by the said witness at said time.

I further certify that I am not of counsel nor in any way interested in the result of said suit.

In witness whereof I have hereunto set my hand and seal this 10th day of Febuary, 1912.

[Seal] A. C. BOWMAN,
United States Commissioner.

COMMISSIONER'S TAXABLE COSTS:
(This Hearing)

Hearing Feb. 1, 1912......................	$3.00
Transcript and cert......................	1.00
	$4.00

[Indorsed]: Supplemental Testimony. Filed in the U. S. District Court, Western District of Washington. Feb. 13, 1912. A. W. Engle, Clerk. By S., Deputy. **[31]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4429.

T. J. KING and A. WINGE, Copartners Doing Business as KING & WINGE,
Libelants,

vs.

Gas Boat "BAINBRIDGE," etc.,
Respondent.

INLAND NAVIGATION COMPANY, a Corporation,
Claimant.

ASTORIA IRON WORKS, a Corporation,
Intervenor.

Stipulation as to Facts.

It is herein stipulated by and between Mr. Ira Bronson, proctor for the Inland Navigation Company, a corporation, claimant, and Mr. C. C. Dalton, one of the proctors for the Astoria Iron Works, a corporation, intervenor herein, that the following facts are the true facts and shall be considered as additional testimony in the said cause:

I.

That during the years 1909 and 1910, at the time the Astoria Iron Works, intervening libelant herein, performed the labor and furnished the material as alleged in the complaint, the said Astoria Iron Works were and are now a corporation duly organized and existing under the laws of the State of Oregon, and have complied with the laws of the State of Washington entitling the said corporation to do business in the State of Washington.

II.

That the Sound Motor Company at the time the said labor was performed and said material furnished, as alleged in the complaint, was a corporation of the State of Washington with its offices and principal place of business at Seattle, in the State of Washington. [32]

III.

That said gas boat "Bainbridge" was a domestic vessel of the United States, registered in the Customs-House at Port Townsend, Washington, and engaged exclusively in navigating the waters of Puget

Sound within the boundaries of the State of Washington.

Done this 5th day of March, 1912.

C. C. DALTON,

One of the Proctors for Intervening Libelant.

IRA BRONSON,

Proctor for Inland Navigation Company, a Corporation, Claimant.

[Indorsed]: Stipulation as to Facts. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 24, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy. [33]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4429.

T. J. KING and A. WINGE, Copartners Doing Business as KING & WINGE,

Libelants,

vs.

Gas Boat "BAINBRIDGE," etc.,

Respondent.

INLAND NAVIGATION COMPANY, a Corporation,

Claimant.

ASTORIA IRON WORKS, a Corporation,

Intervenor.

Petition for Appeal and Order Allowing Same.

The above-named intervenor and appellant, Astoria Iron Works, a corporation, conceiving itself aggrieved bv the decree of said Court, entered on June 13, 1912, in the above-entitled court, hereby appeals from said decree to the United States Circuit Court of Appeals of the Ninth Circuit, and prays that its appeal be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, properly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

C. C. DALTON,
HERBERT W. MEYERS,
Proctors for Intervenor and Appellant.

On reading the foregoing petition and also the assignment of error herewith presented, and after due consideration thereof,

It is ordered, that the said appeal be allowed as prayed for, and that the penalty of the bond on appeal is hereby fixed at the sum of two hundred and fifty dollars.

Dated this 10th day of October, 1912. [34]

CLINTON W. HOWARD,
Judge.

[Indorsed]: Petition for Appeal and Order Allowing Same. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 10, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy. [35]

In the United States District Court for the Western District of Washington, Northern Division.

No. 4429.

T. J. KING and A. WINGE, Copartners, Doing Business as KING and WINGE,

Libelants,

vs.

Gas Boat "BAINBRIDGE," etc.,

Respondent.

INLAND NAVIGATION COMPANY, a Corporation,

Claimant.

ASTORIA IRON WORKS, a Corporation,

Intervenor.

In the United States District Court for the Western District of Washington, Northern Division.

No. 4429.

T. J. KING and A. WINGE, Copartners, Doing Business as KING & WINGE,

Libelants,

vs.

Gas Boat "BAINBRIDGE," etc.,

Respondent.

INLAND NAVIGATION COMPANY, a Corporation,

Claimant.

ASTORIA IRON WORKS, a Corporation,

Intervenor.

Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, Astoria Iron Works, a corporation, as principal, and National Surety Company as surety, are held and firmly bound unto gas boat "Bainbridge," respondent above named, in the sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said gas boat "Bainbridge," its executors, successors, or assigns, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly and truly by these presents.

Sealed with our seals and dated this 10th day of October, 1912.

Whereas, intervenor above named has sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit on appeal from the judgment of the above-named court in favor of the respondent and against the intervenor in the amount of the costs to be taxed;

Now therefore, the condition of this obligation is such that the above-named defendant shall prosecute said Writ of Error to effect and answer all costs and damages if it shall fail to make [36] good its plea, then this obligation shall be void; otherwise shall be in full force, virtue and effect.

Witness our seals and names hereto affixed the day and year first above mentioned.

ASTORIA IRON WORKS,
By C. C. DALTON,
Attorney.

[Seal] NATIONAL SURETY COMPANY.
By GEO. W. ALLEN,
Attorney-in-fact.

Due, legal and timely service of the foregoing Bond is hereby accepted.

.................,
Attorney for Respondent.

[Indorsed]: Bond. Filed in the U. S. District Court, Western Dist. of Washington, Oct. 10, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy. [37]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4429.

T. J. KING and A. WINGE, Copartners, Doing Business as KING & WINGE,
Libelants,

vs.

Gas Boat "BAINBRIDGE," etc.,
Respondent.

INLAND NAVIGATION COMPANY, a Corporation,
Claimant.

ASTORIA IRON WORKS, a Corporation,
Intervenor.

Assignment of Error.

The above-named intervenor and appellant, Astoria Iron Works, a corporation, by its counsel, says that in the record and proceedings in said cause there is manifest error, in this, to wit:

(1) That the Court erred in holding that the evidence failed to prove that there was any agreement or understanding or consent on the part of the owner of the boat required to subject the vessel to a lien.

(2) That the Court erred in holding as a matter of law that it was necessary to prove that there was an agreement or understanding or consent on the part of the owner of the boat that the labor and materials were furnished upon the credit of the vessel in order to subject the vessel to a lien for material and labor furnished.

(3) That the Court erred in disallowing the claim of the intervenor by reason of the claim being older than the National lien statute of 1910. [38]

(4) That the Court erred in declining to decree judgment to the intervenor for the amount found, as a matter of fact, to be due.

WHEREFORE, the said intervenor, plaintiff in error, prays that the judgment of the said trial Court be reversed as to it and that the District Court of the United States for the Western District of Washington, Northern Division, be directed to enter judg-

ment for the intervenor for the full amount due as established by the evidence, and for costs.

C. C. DALTON and
HERBERT W. MEYERS,
Proctors for Intervenor and Appellants.

[Indorsed]: Assignment of Error. Filed in the U. S. District Court, Western Dist. of Washington, Oct. 10, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy. [39]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4429.

T. J. KING and A. WINGE, Copartners Doing Business as KING & WINGE,

Libelants,

vs.

Gas Boat "BAINBRIDGE," etc.
INLAND NAVIGATION COMPANY, a Corporation,

Claimant.

ASTORIA IRON WORKS, a Corporation,

Intervenor.

Notice of Appeal.

To the Above-named Plaintiffs and to Daniel Landon, Their Attorney, and to Gas Boat "Bainbridge," etc., and to Ira Bronson, Their Attorney:

You and each of you will please take notice that intervenor in the above-entitled action hereby appeals to the Circuit Court of Appeals of the United

States for the Ninth Judicial Circuit, from the judgment therein entered, in the above-named United States Circuit Court on the 1st day of July, 1912, in favor of libelants in said action, and against the intervenor, Astoria Iron Works, and from the whole and each and every part thereof, and also from the order denying the said Intervenor's motion for new trial, made and entered in the minutes of the Court on the 3d day of June, 1912.

Dated this 14th day of August, 1912.

C. C. DALTON,
HERBERT W. MEYERS,
Attorneys for Intervenor.

Copy of within Notice of Appeal received and due service of the same acknowledged this 14th day of Aug., 1912. IRA BRONSON. [40]

[Indorsed]: Notice of Appeal. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 24, 1912. Frank L. Crosby, Clerk. F. A. Simpkins, Deputy. [41]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4429.

T. J. KING and A. WINGE, Doing Business as KING & WINGE,

Libelants,

vs.

Gas Boat "BAINBRIDGE," etc.,

Respondent.

ASTORIA IRON WORKS,

Intervenor.

INLAND NAVIGATION COMPANY, a Corporation,

Claimant.

Praecipe [for Record on Appeal].

To the Clerk of the Above-entitled Court:

You will please prepare record on appeal, including: Intervening Libel and Answer to same, Commissioner's Report, Findings of Fact and Conclusions of February 13, 1912, Order Permitting Intervention, Order of Reference, ~~Exceptions to Commissioner's Report,~~ Memorandum Decision of June 13, 1912, Decree of Dismissal as to Astoria Iron Works filed July 1, 1912, Testimony of Libelants King and Winge, and Additional Testimony of Libelants King and Winge and of Intervening Libelants, Stipulation entered into between Intervening Libelants and Claimant, Petition for Appeal, Order Allowing Appeal, Bond, Assignment of Error, Citation, Praecipe, Notice on Appeal.

C. C. DALTON,

HERBERT W. MEYERS,

Attorneys for Intervenor.

[Indorsed]: Praecipe. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 10, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy. [42]

[Certificate of Clerk U. S. District Court to Apostles, etc.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4429.

T. J. KING and A. WINGE, Doing Business as KING & WINGE,

Libelants,

vs.

Gas Boat "BAINBRIDGE," etc.,

Respondent.

ASTORIA IRON WORKS,

Intervenor.

INLAND NAVIGATION COMPANY, a Corporation,

Claimant.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify the foregoing 46 typewritten pages, numbered from 1 to 46, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause, as is called for by the praecipe of proctors for intervenor and appellant, as the same remain of record and on file in the office of the Clerk of said Court, and that the same constitutes the Apostles on appeal from the order, judgment and decree of the District Court of

the United States for the Western District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit at San Francisco, California.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

I further certify that the cost of preparing and certifying [43] the foregoing Apostles on appeal is the sum of $31.10, and that the said sum has been paid to me by Messrs C. C. Dalton and Herbert W. Meyers, proctors for intervenors and appellants.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Seattle, in said District, this 29th day of October, 1912.

[Seal] FRANK L. CROSBY,

Clerk. [44]

[Citation on Appeal.]

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Gas Boat "Bainbridge," Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, within thirty days from the date of this Citation, pursuant to an appeal filed by the intervenor and appellant, Astoria Iron Works, in the office of the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, in a cause wherein T. J. King & A. Winge, copartners, doing business as King & Winge, are libelants, Astoria Iron Works,

a corporation, is intervenor and appellant, and the gas boat "Bainbridge" is respondent, to show cause if any there be why the decree against the intervenor and appellant should not be reversed and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 10th day of October, 1912.

[Seal] CLINTON W. HOWARD,

District Judge of the United States District Court, Western District of Washington.

Due service of the within Citation after the filing of the same in the office of the Clerk of the above-entitled court is hereby admitted this 10th day of October, 1912.

IRA BRONSON,

Proctor for Claimant. [45]

[Indorsed]: No. 4429. In the District Court of the United States for the Western District of Washington, Northern Division. T. J. King & A. Winge, Libelants, vs. Gas Boat "Bainbridge," Respondent. Inland Navigation Co., Claimant. Astoria Iron Works, a Corporation, Intervenor. Citation. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 10, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy. Herbert W. Meyers, Attorney at Law, 430–433 Pioneer Building, Seattle, Wash. [46]

[Endorsed]: No. 2196. United States Circuit Court of Appeals for the Ninth Circuit. Astoria Iron Works, a Corporation, Intervenor, Appellants, vs. Inland Navigation Company, a Corporation, Claimant of the Gas Boat "Bainbridge," Her Tackle, etc., Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed November 7, 1912.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ASTORIA IRON WORKS, a corporation,
Intervenor and Appellant.

vs.

GAS BOAT BAINBRIDGE, ETC.,
Appellee.

INLAND NAVIGATION COMPANY, a corporation,
Claimant.

T. J. KING & A. WINGE, co-partners doing business as KING & WINGE,
Libelants.

No. 2196

Brief of Intervenor and Appellant

STATEMENT.

Upon the hearing of this libel before the Court Commissioner, the Commissioner found that, as a matter of fact, the Astoria Iron Works, intervenor,

at the special instance and request of the owners of the gas boat "Bainbridge," furnished certain gas engines and other fixtures which were installed in the said boat Bainbridge, of the reasonable value of $3,550.00, and, also, furnished extra material and labor of the value of $189.00, making a total of $3,739, no part of which sum has been paid, except $1,000, leaving a balance due and owing to the Astoria Iron Works of $2,739. The Commissioner failed to find that an agreement had been made between the Astoria Iron Works and the owners of the gas boat Bainbridge, under the terms of which the said engines, fixtures and labor were to be furnished or performed upon the faith and credit of the said gas boat Bainbridge. In view of his failure so to find, the Commissioner concludes that no lien attaches in favor of the Astoria Iron Works, intervenor, for the sum found to be due, and omitted to establish the right of the intervening libelant to such lien against the gas boat Bainbridge, in his "conclusions of law" submitted to the Court. The intervening libelant excepted to the Commissioner's finding of fact "that no agreement was made between the intervening libelant and the owners of said respondent that said en-

gines, fixtures and labor should be performed on the faith and credit of the said Bainbridge, and to the ruling of the Commissioner in refusing to hold, as a conclusion of law, that the intervening libelant is entitled to a lien against the Bainbridge in the sum of $2,739, and costs and disbursements. Upon hearing of the argument of the intervening libelant upon the exceptions taken to the finding and conclusion of the Commissioner, the Court held that, while the amount of the claim had been established, the evidence failed to prove that there was any agreement or understanding or consent on the part of the owner of the boat required to subject the vessel to a lien under the rule established by the decision of the Circuit Court of Appeals in the case of the *Alaska & Pacific Steamship Company v. C. W. Chamberlain*, 116 Fed. 600, and, as the claim was older than the national lien statute of 1910, the claim was disallowed.

The intervening libelant prosecutes its writ of error to this Court upon the error of the trial court in holding

(1) That the evidence failed to prove an agreement, understanding or consent on the part of the

owner of the boat required to subject the vessel to a lien.

(2) That it was necessary to prove that there was such an agreement or understanding or consent.

(3) That the claim should be disallowed, and

(4) That the intervening libelant was not entitled to judgment.

ARGUMENT.

The attention of this Court is called to the fact, as found by the lower Court, that the intervening libelant did furnish certain gas engines, fixtures and labor to the owners of the Bainbridge of the reasonable value of $3,739, and there is now due and owing to the said intervening libelants the sum of $2,739. In view of this finding of fact it must be considered that the Court failed to find, as a matter of law, that the intervening libelant was entitled to a lien for the sum found to be due because he did not find that there was an agreement between the intervening libelants and the respondent that the engines, fixtures and labor should be furnished and performed upon the faith and credit of the Bainbridge. In

this connection, the intervening libelant contends that it is entitled to a lien against the Bainbridge, upon the establishment of the fact that engines, fixtures and labor were furnished and not paid for, regardless of whether or not there was any contract between the owner and the intervening libelant, based upon the faith and credit of the vessel, in view of the statute of the State of Washington, which makes all steamers, vessels and boats, their tackle, apparel and furniture liable:

"For work done or material furnished in this state for their construction, repair or equipment at the request of their respective owners, charterers, masters, agents, consignees, contractors, sub-contractors or other person or persons having charge in whole or in part of their construction, alteration, repair or equipment; and every contractor, builder or person having charge, either in whole or in part, of the construction, alteration, repair or equipment of any steamer, vessel or boat, shall be held to be the agent of the owner for the purposes of this chapter, and for supplies furnished in this state for their use, at the request of their respective owners, charterers, masters, agents or consignees, and any person having charge, either in whole or in part, of the purchasing of supplies for the use of any such steamer, vessel or boat, shall be held to be the agent of the owner for the purposes of this chapter."

Sec. 1182, R. & B., p. 2.

It will be noticed that this statute of the State of Washington gives a lien to material men for supplies and labor furnished to a local vessel in its home port in this State. The gas boat Bainbridge was a small vessel owned in, and whose home port was, the city of Seattle, in which home port the materials and labor were supplied and furnished, and the vessel was exclusively engaged in navigating the waters of Puget Sound, and entirely within the boundaries of the State of Washington. It is held by the Supreme Court of the United States that in the case of repairs or necessaries furnished in the port or state to which the ships belong, the case is governed by the local law of the state altogether, as no lien is implied, unless it is recognized by that law; but if, however, the local law gives a lien, it may be enforced in the admiralty in proceedings *in rem*.

The General Smith, 4 Wheat. 438 (4 L. Ed. 609).

The Steamboat Planter, 7 Pet. 324 (8 L. Ed. 700).

Ramsay v. Allagree, 12 Wheat. 611 (6 L. Ed. 746).

J. E. Rumbell, 148 U. S. 1 (37 L. Ed. 345).

The St. Jago De Cuba, 9 Wheat. 409 (6 L. Ed. 122).

The Lottawanna, 21 Wall. 558 (22 L. Ed. 654).

The Edith, 94 U. S. 518 (24 L. Ed. 167).

New Jersey Steam Nav. Co. & Merchants Bank, 6. How. 344 (12 L. Ed. 4651).

The John G. Stevens, 170 U. S. 113 (42 L. Ed. 969).

Perry vs. Haines, 191 U. S. 17 (48 L. Ed. 73).

The Glide, 167, U. S. 606 (42 L. Ed. 296).

In the case of *The Glide*, 167 U. S. 606, the exact point involved in this present case was passed upon by the United States Supreme Court, and it was in the opinion said:

"The question in this case is whether the lien given by a statute of Massachusetts for repairs made upon a vessel in her home port, under a contract with her owners or their agent, may be enforced against her by petition in a court of the state, as provided in that statute, or can be enforced only in an admirality court of the United States."

After an exhaustive review of the decisions of the court in similar cases, the opinion of the court upon the question involved is stated in this language:

"In conclusion, the consideration by which this case must be governed may be summed up as follows: The maritime and admiralty jurisdiction conferred by the constitution and laws of the United States upon the district courts of the United States is exclusive.

A lien upon a ship for repairs or supplies, whether created by the general maritime laws of the United States, or by a local statute, is *a jus in re,* a right of property in the vessel, and a maritime lien, to secure the permanence of a maritime contract, and therefore may be enforced by admiralty process *in rem* in the district courts of the United States. When the lien is created by the general maritime law for repairs or supplies in a foreign port no one doubts at the present day that under the decisions in *The Moses Taylor* and the *Ad. Wine,* 74 U. S., 4 Wall 411, above cited, the admiralty jurisdiction *in rem* of the courts of the United States is exclusive of similar jurisdiction of the courts of the state.

The contract and the lien for repairs or supplies in a home port, under a local statute, are generally maritime and equally within the admiralty jurisdiction, and that jurisdiction is equally exclusive."

In the case of *Perry v. Haines,* 191 U. S. 17, the United States Supreme Court said:

'That a state may provide for liens in favor of material men for necessaries furnished to a vessel in her home port, or in a port of the state to which she belongs, though the contract to furnish the

same is a maritime contract, and that such liens can be enforced by proceedings *in rem* in the district courts of the United States, is so well settled by a series of cases in this court as to be no longer open to question. The remedy thus administered by the admiralty court is exclusive * * *."

And again in the same case, the court says of contracts of the character of the contract in the present case:

"It is believed that, since the case of The Belfast, the distinction has never been admitted between contracts concerning vessels engaged in trade between ports of the same, and between ports of different states. Of course, nothing herein said is intended to trench upon the common law jurisdiction of the state courts, which is and always has been, expressly saved to suitors 'where the common law is competent to give it.'

By that law, an action will always lie against the master or owner of the vessel, and, if the laws of the state permit it, the vessel may be attached as the property of the defendant in the case * * *. A statute providing that a vessel may be sued and made defendant without any proceeding against the owners, or even mentioning their names, partakes of all the essential features of an ordinary proceeding *in rem,* of which exclusive jurisdiction is given to the district courts of the United States * * *. The action against the boat by name, authorized by the statute of California, is a proceeding in the nature, and with the incidents, of a suit in ad-

miralty. The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly."

Not only do the terms of the contract in this case stamp the contract as a maritime contract, but the statute of the state governing the enforcement of the lien in such cases clearly and definitely recognizes and establishes them as maritime contracts and liens, when it says:

"Such liens may be enforced, in all cases of maritime contracts or service, by a suit in admiralty, *in rem*, and the law regulating proceedings in admiralty shall govern in all such suits; and in all cases of contracts or service not maritime, by civil action in any district court of this territory.

Sec. 1183, R. & B.

And,

"The liens hereby created may be enforced by a suit, *in rem*, and the law regulating like proceedings shall govern in all such suits."

Sec. 1186, R. & B.

So that the lien which the intervening libelant asks to have enforced by the Federal Court is a strictly maritime lien given by the statute of the state and, being such, a lien is cognizable and enforceable only by the Federal Courts.

The Court did not give a lien against the vessel evidently for the reason that he did not find the contract made upon the faith and credit of the vessel. The lien is a creature of the statute, in this instance, and the statute creating it does not specify that, in order for the lien to arise or attach, the material furnished, or work done, shall be furnished or done *upon the faith and credit of the vessel,* nor does it place any other restriction upon it. It creates a lien whenever materials are furnished or labor performed in the construction, repair or equipment of vessels *at the request of their owners* or other persons by the owners authorized, which lien is enforceable in the courts of the United States.

Again referring to the case of *The Glide, supra.,* the Court said:

"The only point directly adjudged in *The General Smith* was that there was no lien for repairs or supplies in the home port, which could be enforced *in rem* in admiralty, *unless such a lien was recognized by the local law of the state. But the opinion clearly implied that, if so recognized, the lien could be enforced in rem in a court of the United States sitting in admiralty.*"

Now it must be conceded that the lien in this case is given and recognized by the local laws, and

that it may be enforced in the United States courts. It is equally true that the lien is not restricted to materials furnished or labor done upon the faith and credit of the vessel, since it is to lie if the materials and labor are provided "at the request of the owner." There would seem to be no reason nor way for the United States court to decline to enforce the lien thus created, since the jurisdiction is exclusive.

The question is, therefore: Is a case arising entirely under the laws of the state of Washington cognizable by the United States courts, to be enforced in those courts strictly according to the law of the state, or is it to be enforced partly according to the law of that state and partly according to the law of some other state, or the general maritime law? If according to the law of that state alone, then a lien given for material and labor furnished at the request of the owner of the vessel must be enforced regardless of whether or not the materials and labor were furnished under a contract "upon the faith and credit of the vessel."

In the memorandum decision handed down by the trial court upon the exceptions taken to the finding of fact and conclusion of law by the com-

missioner, the court bases its opinion upon the holding of this Court in the Robert Dollar case. (*Alaska Pacific Steamship Co. vs. C. W. Chamberlain*, 116 Fed. 600.)

The appellant contends that there is a material distinction between the present case and the case cited, and that the case of the "Robert Dollar" supports the contention as made in the present case.

In the Dollar case the record shows that the appellee, upon order of the Alaska Pacific Steamship Co. sold *supplies* and delivered them on board the steamship *for the use of crew and passengers,* while in the case now under consideration the engines, fixtures, etc., were delivered on board the Bainbridge *and became a part of that vessel.* If, in the Dollar case

> "The supplies having been furnished to the charterer, and at the place of its residence, the presumption is that credit was given to the charterer, *and not to the vessel;*

by the same parity of reasoning might it not be equally as well said that:

The engines, fixtures, etc., having been furnished to the Bainbridge and attached to and made

a part of that vessel, at her home port, the presumption is that credit *was given to the vessel,* and not to the owners?

While it may be true that a contract for *supplies* for a vessel made directly with the owner in person is presumed to have been made on his ordinary responsibility without a view to the vessel as a fund from which compensation is to be derived, it cannot well be said that the *motive power and other fixed parts* of the vessel—fixtures attached to and made a part of the vessel—can be presumed to have been delivered to the vessel without it being in contemplation of both the parties to the transaction—the vendor and vendee—that for non-payment of the purchase price the vendor should have recourse to the vessel.

"It is not necessary, it is true, that the common intent so to bind the vessel be expressed in words *or in the form of an agreement.* It may be established by *proof of circumstances* from which the common intent may be *deduced,* but in all cases it is essential that the evidence shall show a purpose upon the part of the seller to sell upon the credit of the vessel, and upon the part of purchaser to pledge the vessel. In short, there can be no lien unless it was in the contemplation of both parties to the transaction, evidenced either by express words

to that effect *or by circumstances of such a nature as to justify the inference.*"

> *Alaska Pacific S. S. Co. v. C. W. Chamberlain*, 116 Fed. 600.

It may be reasonable to presume that a person who sold supplies for the use of the crew and passengers of a vessel, and which supplies were not to become a part of the vessel itself, might not have in contemplation any right to believe that he might look to the vessel itself for satisfaction of his claim for pay for the supplies for the crew and passengers so delivered by him, in view of the fact that such supplies would not remain tangible objects and recoverable by the seller upon proper legal process, but in no transaction concerning the sale and delivery of material, tangible articles sold and delivered for the purpose of being made a part of a vessel, building, etc., would either the vendor or purchaser eliminate from the transaction, by so much as a thought, the right of the vendor to retake the property from the vessel upon proper process, in the event of the arising of his right so to do, for any cause.

In the testimony of John Fox, President of the appellant corporation, will be found:

"Q. State whether or not in the purchasing of the material that you have testified and the work performed on the vessel in placing the engine equipment in the vessel whether or not you depended upon the credit of the vessel for payment?

A. Any time we furnish anything for any vessel we always hold the vessel, that is, we bill the vessel and hold the vessel for the repairs.

Q. Well, at the time that you agreed to furnish the machinery and perform these services as you testified to, did you have any understanding of any kind with the Sound Motor Company as to holding the vessel for payment of the amount in case it was not paid?

A. No, I did not have any understanding to hold the vessel, it was not mentioned; I did not mention it, but it was understood that we were to hold the engine until the final payment was made, but there was nothing said about holding the vessel, as I remember."

In view of the fact that the engine was to be placed in and become a part of the vessel before final payment was to be made for it, an understanding that the seller was "to hold the engine until the final payment was made" is tantamount to an understanding that the vessel was to be held, since if the engine be held and recovered upon proper proceeding, the vessel itself would, of necessity, be held also.

Special attention is called to the fact, as shown by the testimony of witness Fox, that the materials, engines, etc., were billed to the "Bainbridge" and not to the owner of the vessel. It is submitted that this fact, being within the knowledge of the owner and not objected to by him at the time, is an additional *circumstance* from which may be *deduced* an intent upon the part of the owner to recognize the right and intention of the seller to hold the vessel for payment and to estop the owner from asserting that it was the intention to hold the owner for payment on his own responsibility. If such be true, is it not a *"circumstance of such a nature as to justify the inference"* that the parties to the transaction contemplated "the vessel as the fund from which compensation is to be derived," and thereby charge the vessel, instead of the owner "on his ordinary responsibility"?

Having shown *circumstances* from which *common intent* to bind the vessel may be *deduced*, it is submitted that in accord with all adjudicated cases wherein this identical point has been raised, including the Dollar case, cited in the memorandum decision in the present case, there was error in the ruling of the trial court, and prays that this court

make the necessary order to the end that the said error be corrected and the rights of the intervening libelant established. All of which is respectfully submitted.

C. C. DALTON,
HERBERT W. MEYERS,
Proctors for Intervening Libelant and Appellant.

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASTORIA IRON WORKS, a corporation,
Appellant,

—vs.—

INLAND NAVIGATION COMPANY, a corporation, Claimant of the Gas Boat "BAINBRIDGE," her tackle, etc.,
Appellee.

No. 2196

BRIEF OF APPELLEE

STATEMENT.

In 1909 and 1910 at Seattle, Washington, the appellant, Astoria Iron Works, installed certain engines and fixtures in a domestic vessel called the "Bainbridge." These installations were made at the request of the vessel's then owner, Sound Motor

Company, a corporation, with headquarters at Seattle; and with labor and material amounted in value to the sum of $3,739.00, of which sum $1,000.00 was paid by the Sound Motor Company. (Rec. 11, 12, 31).

In December, 1910, the appellant filed its intervening libel claiming a lien upon the "Bainbridge" for the above work in the amount of $3,020.30. Her then owner, Inland Navigation Company, appellee here, denied all the allegations of the libel, chiefly for want of sufficient knowledge or information to form a belief concerning the same. (Rec. 4, 8).

Subsequently evidence was taken upon the part of the appellant, and the appellee offering none, the cause was submitted to the Court which held that the claim being older than the National Lien Statute of 1910—and there being no proof that the work was done upon the credit of the vessel—that the said claim should be disallowed under the authority of *Alaska & P. S. S. Co. et al. vs. C. W. Chamberlain & Co.*, 116 Fed., 600; a decision rendered by this Court in 1902. (Rec. 15, 16).

From such holding this appeal has been taken.

ARGUMENT.

I.

AS A MATTER OF LAW A COMMON INTENT ON THE PART OF BOTH PARTIES TO THE TRANSACTION TO BIND THE VESSEL IS NECESSARY TO CREATE A LIEN EVEN UNDER A STATE STATUTE.

The appellant sought in the lower court to establish a lien under the Washington Statute for repairs made upon a vessel at Seattle, her home port, at the request of a corporate owner, with offices and principal place of business at Seattle, and having failed to do so, appeals assigning among other errors the following:

"(2) That the court erred in holding as a matter of law that it was necessary to prove that there was an agreement or understanding or consent on the part of the owner of the boat that the labor and materials were furnished upon the credit of the vessel in order to subject the vessel to a lien for material and labor furnished."

It is plain that appellant asks this court to reverse its decision heretofore rendered in the case of *Alaska & P. S. S. Co. et al. vs. C. W. Chamberlain*, 116 Fed. 600, for in that case, involving a claim of lien, under the Washington statute, for provisions furnished a vessel at Seatle, her home port, at the request of a corporate owner with offices and principal place of business at Seattle, this Court said:

"In short there can be no lien unless it was in the contemplation of both parties to the transaction, evidenced either by express words to that effect or

by circumstances of such a nature as to justify the inference."

The rule of that decision was reiterated by this court in 1910, the court saying through Ross, Circuit Judge:

"The presumption that attends the making and furnishing of such supplies to a ship in a foreign port upon the orders of her master is not sufficient to establish a valid lien on a vessel in her home port given only by virtue of a local law. In the latter case, proof that the supplies were furnished upon the credit of the ship is essential to the validity of the lien (*Alaska & P. S. S. Co. vs. C. W. Chamberlain & Co.,* 116 Fed. 600, 54 C. C. A. 56), and proof, either express or implied, that both parties to the transaction so understood."

The F. A. Kilburn, 179 Fed. 107.

The case has further been cited and followed as persuasive authority in an opinion by Cross, District Judge of the U. S. District Court of New Jersey, and again by Hazel, District Judge of the Western District of New York.

The Alligator, 153 Fed. 219.

The William P. Donnelly, 156 Fed. 305.

The rule has long obtained in the Second Circuit.

A claim of lien for coal furnished a domestic vessel in her home port under a New York statute was thus disposed of by Lacombe, Circuit Judge:

"Under a state statute, however, as well as under the general maritime law, a lien will not attach

unless it appears that credit was given to the ship. This Court so held after a careful discussion of the authorities in *The Electron,* 74 Fed. 689, 21 C. C. A. 12."

The Golden Rod, 151 Fed. 9.

The same rule has been followed in the sixth circuit. In discussing the matter with regard to the Michigan Statute, Taft, Circuit Judge, points out that although the courts of the United States will enforce liens created by state statutes of this character, they will and must import into such statutes the limitations which are always applicable to this general class of liens under the admiralty law. He then holds that one of these limitations is that to claim a lien, credit must be given to the vessel, and concludes:

"It follows from these authorities that the Courts of Admiralty will not enforce a maritime lien against a vessel for supplies created by a state statute, unless the supplies were furnished upon the credit of the vessel for that is indispensible to the existence of liens of this class."

The Samuel Marshall, 54 Fed. 396-404.

Without wasting time in further citation, for the above citations do not even begin to be exhaustive, let us consider upon what authorities the appellant bases its contention that the *Chamberlain* case be overruled. Presumably they are the cases cited upon pages six and seven of its brief. But these cases merely hold that if the local law gives a lien

it may be enforced in admiralty. No one disputes that proposition. These cases do not seem to us to militate against the principle of the *Chamberlain* case in any particular, nor have they so seemed to others better qualified to judge. Selecting one or two .of appellant's cases at random we find that the *Lottowana,* 21 Wall, 558, was the basis upon which Judge Taft built his opinion in the *Samuel Marshall,* from which we have quoted above. In the *Electron,* 74 Fed. 694, Shipman, Circuit Judge, said:

"The Court in the *Lottowanna* case further said: 'Of course, this modification of the rule cannot avail where no lien exists; but where one does exist, no matter by what law, it removes all obstacles to proceedings in rem, if credit is given to the vessel.' If full force is given to the last clause of the sentence, it is an implication that no proceedings in rem can be had against domestic ships, if no credit has been given to the vessel, and that such credit necessarily preceded any lien which could be recognized by an admiralty court. In the *Howard,* 29 Fed. 604, a case under the New Jersey statute, this was understood by Judge Wales to be the law of the Lottawanna. The case was one of supplies furnished to charterers at the home port of New Jersey, and was regarded as one exclusively of fact, and upon a finding that no credit had been given to the vessel the libel was dismissed."

The *Lottawanna* case is also cited together with the *Chamberlain* case in the *William P. Donnelly,* 156 Fed. 303, in deciding that a lien on a domestic vessel for supplies furnished in her home port will not attach in the absence of proof that credit was given to the vessel.

The Glide, 157 U. S. 606, which we find at the end of appellant's list and which the appellant says passes upon "the exact point involved in this present case," and from which it quotes with liberality, decides merely that these state statute liens cannot be enforced by admiralty proceeding *in rem* in the state courts; but in a *dictum,* quoting by the way from the *J. E. Rumbel,* 148 U. S. 1, another of appellant's cases, cited in its list as militating against the *Chamberlain* case, the Court says that "the lien created by the statute of a state for repairs or supplies furnished a vessel in her home port rests * * * on the credit of the ship herself * * *"

The cases cited by appellant have no bearing upon the question at hand and do not modify the *Chamberlain* case in any way, much less do they call for its reversal. In fact few if any cases can be found in the reports that are grounded upon better reason or supported by more overwhelming authority.

II.

AS A MATTER OF FACT APPELLANT'S EVIDENCE AFFIRMATIVELY SHOWS AN ABSENCE OF COMMON INTENT TO BIND THE VESSEL.

The appellant does not even clearly plead, much less prove, that the materials furnished and work done was furnished upon the credit of the vessel. In fact it expressly and affirmatively proved the contrary. His pleading is as follows:

"The material furnished and work done was done within less than three years, and those performing and furnishing the same relied on the assurance of the owners and the agents, and at the same time they believed that they could hold the said gas boat "Bainbridge" for said work and material." (Rec. 6.)

"Relied on the assurances." What kind of assurances, guarantees, promises of payment, or what, and of what materiality is their belief? But let us see if these indefinite allegations are clarified by the evidence upon which appellant relies and which it quotes on page 16 of its brief.

"Q. State whether or not in the purchasing of the material that you have testified and the work performed on the vessel in placing the engine equipment in the vessel whether or not you depended upon the credit of the vessel for payment?

"A. Any time we furnish anything for any vessel we always hold the vessel, that is, we bill the vessel and hold the vessel for the repairs."

With respect to this we quote from the *Chamberlain* case:

"In *The Valencia* it was said: 'In the absence of an agreement, express or implied, for a lien, a contract for supplies, made directly with the owner in person, is to be taken as made on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived.' That presumption may be rebutted only by proof that credit was in fact given to the vessel. But in order to establish that fact it is necessary to show that such was the intention of both parties to the

transaction. It is not sufficient that the vendor so understood, or that he charged the supplies to the vessel, and so entered them upon his books of account."

The remainder of the evidence upon which appellant relies is as follows:

"Q. Well, at the time that you agreed to furnish the machinery and perform these services as you testified to, did you have any understanding of any kind with the Sound Motor Company as to holding the vessel for payment of the amount in case it was not paid?

"A. No, I did not have any understanding to hold the vessel, it was not mentioned; I did not mention it, but it was understood that we were to hold the engine until the final payment was made, but there was nothing said about holding the vessel, as I remember."

Again we quote from the *Chamberlain* case:

"In all cases it is essential that the evidence shall show a purpose upon the part of the seller to sell upon the credit of the vessel, and upon the part of the purchaser to pledge the vessel. In short, there can be no lien unless it was in the contemplation of both parties to the transaction, evidenced either by express words to that effect or by circumstances of such a nature as to justify the inference."

The above quotations set forth all the evidence upon which appellant relies. So far from proving a common understanding, it expressly disproves it. The president of the appellant company who alone made the bargain, says: "No, I did not have any

understanding to hold the vessel; it was not mentioned; but it was understood that we were to hold the engines until final payment was made, but there was nothing said about holding the vessel, as I remember."

This is good evidence that appellant intended to sell some engines on an oral conditional contract of sale. It is a flat disclaimer of an intention to create an admiralty lien on a vessel. Nor is there any evidence tending to show the state of mind of the owner.

The appellant seeks to disprove its own evidence by deductive reasoning, but there is here no field for the use of that form of intellectual acrobatics. The appellant affirmatively proved in the lower court that there was no intent on its part to bind the vessel. How, then, shall we now deduce that there was a common intent to do so?

For the foregoing reasons, we respectfully pray that the judgment of the lower Court in all things be affirmed and the appellee granted judgment for costs.

Respectfully submitted,

IRA BRONSON,
J. S. ROBINSON,
Proctors for Appellee.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ASTORIA IRON WORKS, a corporation, *Intervenor and Appellant,* vs. GAS BOAT BAINBRIDGE, ETC., *Appellee.* INLAND NAVIGATION COMPANY, a corporation, *Claimant.* T. J. KING & A. WINGE, co-partners doing business as KING & WINGE, *Libelants.*	No. 2196.

Reply Brief of Intervenor and Appellant

The statement that "appellant sought in the lower court to establish a lien under the Washington statutes for repairs made upon a vessel at Seattle," as stated in the first paragraph of the argument page 3, of the brief of appellee is at variance

with the facts, and at variance with appellee's statement of the case.

Appellant sought in the lower court to establish a lien under the Washington statutes for "*installing certain engine and fixtures* in the vessel, of the value of $3,550.00 and also furnished extra material and labor of the value of $189.

There is a marked distinction between repairs to a vessel and the installing of *Engine* and *fixtures* in the *construction* of the vessel.

This vessel was practically re-constructed by appellant. The former two forty horse engines propellers, etc., were taken out and a four cylinder, seventy-five horse power engine complete, with shaft, propeller, stuffing box, stern bearing, pipes, etc. installed. (Testimony John Fox rec. p. 22.)

There is also a marked distinction between the furnishing of supplies to a vessel and the installing of *Engine,* and *Fixtures* in the *construction* of the vessel.

Appellant contends as a matter of law, that it is not necessary to prove that there was an agreement or understanding, or consent on the part of the

owner of the vessel that the engine fixtures etc., installed in the construction of the vessel were furnished upon the credit of the vessel, in order to subject the vessel to a lien.

Appellant does not intend to ask this court to reverse its decision heretofore rendered in the case of *Alaska & P. S. S. Co., et al. vs. C. W. Chamberlain.*

In that case the claim was for provisions furnished the vessel for the use of the passengers and crew. In the case at bar, the claim is for engine and fixtures used in the construction of the Bainbridge.

In the case cited by appellant, holding such an agreement, understanding, or consent necessary to bind the vessel, the claims were for supplies, except in the *Runbel* case, where the claim was for supplies and repairs.

The four-cylinder, seventy-five horse-power engine complete, with shaft, propeller, stuffing box, stern bearing, pipes, etc., are as much a part of the vessel as the hull.

Appellant's evidence affirmatively shows an understanding and consent to bind the vessel.

Mr. Fox testified that he depended upon the credit of the vessel. The engine, etc. was billed to the vessel.

It was understood between Mr. Fox and Mr. Monk for the then owner of the vessel, that "we were to hold the engine until the final payment."

Certainly that was intended, and what was understood, was, that the engine would be held as part of the vessel, and not as a unit, separate and a part from the vessel, removable as a cable or an anchor.

To remove this engine from the boat would practically destroy the boat, and would not be permitted. As well give up the entire vessel as to permit the removal of this engine etc.

These are circumstances of such a nature as to justify the inference that the understanding was, to hold the vessel, and that the appellant depended upon the credit of the vessel, which appears plain when taken into consideration with the testimony of Mr. Fox.

Respectfully submitted,

C. C. DALTON,
HERBERT W. MEYERS,
Proctors for Appellant.

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASTORIA IRON WORKS, a corporation, *Intervenor and Appellant,* vs. GAS BOAT "BAINBRIDGE," etc., *Appellee.* INLAND NAVIGATION COMPANY, a corporation, *Claimant,* T. J. KING & A. WINGE, copartners doing business as KING & WINGE, *Libelants.*	No. 2196

APPELLEE'S PETITION FOR REHEARING

TO THE ABOVE ENTITLED COURT:

Comes now the appellee in the above entitled cause and respectfully petitions for a rehearing therein for the following reasons:

I.

Because in rendering its decision the Court seems to have been under a misapprehension as to the facts, in that the Court seems to have understood that there was some privity between the Intervenor, Astoria Iron Works, and the libelant, King & Winge by reason of which a pledge of the credit of the vessel to King & Winge would inure to the benefit of the Intervenor; or in other words that there was some such relation between the parties that proof of intention to pledge the credit of the vessel to King & Winge would constitute proof of intent to so pledge as to the Astoria Iron Works. This is not the case.

II.

Because it does not seem to have been made clear to the Court that the lien here claimed is founded on the same identical statute as the lien claim was founded upon in the case of *Alaska & P. S. S. Co. vs. Chamberlain*, 116 Fed., 600, and that there is no distinction made in that statute between "supplies" and "work done or material furnished" or "repairs or equipment." Accordingly

there is no warrant for discrimination between them and the weight of evidence to establish the fact that credit was given to the vessel should be the same whether the lien is claimed for supplies or equipment.

III.

Because the testimony of appellant's president is consistent with an intention to make an oral conditional sale of engines—a species of contract good in the state where the appellant resides,—and cannot justly be construed to show an agreement to rely on the credit of the whole vessel, particularly when he categorically says: "No, I did not have any understanding to hold the vessel. It was not mentioned."

IV.

Finally we believe that these apparent misconceptions before referred to occurred because at the request of the appellant we consented that the cause should be submitted on briefs. Thus deprived the Court of the aid and assistance of the argument of the proctors for both sides. We believe that on this account that a wrong result was

reached in this case and that an opportunity should be given to correct it.

Respectfully submitted,

IRA BRONSON,
J. S. ROBINSON,
Proctors for Appellee.

STATE OF WASHINGTON: }
COUNTY OF KING, } ss.

J. S. ROBINSON, being first duly sworn, deposes and says: That he is one of the proctors in the above entitled action; that in his belief the foregoing Petition is meritorious and well founded and that it is not interposed for delay.

J S Robinson

Subscribed and sworn to before me this 31st day of January, 1914.

....

NOTARY PUBLIC in and for the State of Washington, residing at Seattle.